CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 06 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BRIERLY-GRANT CORPORATION, an Oklahoma corporation d/b/a Roto-Rooter Sewer & Drain Cleaning Service,

Plaintiff,

vs.

THRIFTY ROOTER, INC., et al.,

Defendants.

No. 91-C-344-E

DOCKET
OCT 9 1992

JUDGMENT

IT IS ORDERED: Pursuant to the Findings of Fact and Conclusions of Law filed this date Judgment be entered in favor of Plaintiff and against Defendants William D. Wakefield and Thrifty Rooter, Inc. in the sum of $112,580.00 actual damages and $15,000.00 punitive damages, with interest from the date of Judgment together with Plaintiff's costs.

DATED this 6th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

50

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FLETCHER B. EISENMENGER,)
)
Plaintiff,)
)
vs.) No. 92-C-871-B
)
RON CHAMPION, ET AL.,)
)
Defendants.)

EOD 10/9/92

ORDER

Plaintiff's motion for leave to proceed in forma pauperis reveals that he has $570.98 in his inmate savings account. Okla. Stat. tit. 57, § 563.2A(5) states that funds from an inmate's savings account may be used for fees or costs in filing a civil action. Plaintiff's motion for leave to proceed in forma pauperis is therefore denied. His complaint is accordingly dismissed at this time without prejudice for failure to pay the required filing fee. See Local Rule 6. The court will reinstate this action if Plaintiff submits to the court the proper filing fee within twenty (20) days from this date.

SO ORDERED THIS 7th day of Oct., 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RADCO, INC.,

Plaintiff,

vs.

BECHTEL CORPORATION, et al.,

Defendants.

No. 92-C-331-E

O R D E R

Before the Court is Defendants' Motion for Change of Venue (docket #8) §1404(a). The motion presents, inter alia, the proverbial race to the courthouse. It also raises venue issues identified in 28 U.S.C. §1404(a). The court finds that the litigation was initially filed by Defendants in the United States District Court for the Southern District of Texas on March 30, 1992. Subsequently, on April 2, 1992, Plaintiff initiated this action in the District Court of Tulsa County, State of Oklahoma whence it was removed to this Court. The record indicates that most of the significant contacts and evidentiary material and witnesses are in Texas. It is, therefore, the judgment of this court that the Defendants' Motion for Change of Venue should be granted and the case, accordingly, transferred to the United States District Court for the Southern District of Texas, Houston Division.

ORDERED this 8th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

CLOSED

44-52

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SYLVIA KNARR,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant.

No. 91-C-398-E

ED0 10/8/92

JOINT STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Sylvia Knarr, and the Defendant, Wal-Mart Stores, Inc., and hereby present their Stipulation of Dismissal of the above-caption cause with prejudice.

APPROVED AS TO FORM:

Ken Ray Underwood
Attorney for Plaintiff

Steven E. Holden
Attorneys for Defendant

CLOSED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TOMMY CRAIG CONAWAY,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

v.

NADIM A. KALED, aka NED A. KALED,

Counterclaim Defendant.

CASE NO. 91-C-509-E

FILED

OCT 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

10/8/92

STIPULATION ~~FOR~~ OF PARTIAL DISMISSAL

It is hereby stipulated and agreed that the complaint filed by the plaintiff, Tommy Craig Conaway, against the United States and the counterclaim filed by the United States against plaintiff, Tommy Craig Conaway, in the above-entitled case be dismissed with prejudice, the parties to bear their respective costs including any possible attorney's fees or other expenses of this litigation.

RICHARD A. HOFFMAN
1701 South Boston Avenue
Tulsa, Oklahoma 74119
(918) 599-9302

Attorney for Plaintiff

DOUGLAS FRAZER
Department of Justice
Tax Division
Ben Franklin Station
Post Office Box 7238
Washington, D.C. 20044
(202) 514-9374

Attorney for Defendant

CLOSED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 7 - 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOHN MIGUEL TIBET,
Plaintiff,

vs.

BOBBY THORPE, et al.,
Defendants.

No. 92-C-861-E

EOD 10/8/92

O R D E R

Plaintiff has filed a civil rights complaint pursuant to 42 U.S.C. § 1983, and a pauper's affidavit. Plaintiff is hereby allowed to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

Upon review of the complaint, it appears to the court that proper venue does not lie in this district. See 28 U.S.C. § 1391(b). Therefore, in the furtherance of justice, this matter is hereby transferred to the United States District Court for the Eastern District of Oklahoma. See 28 U.S.C. § 1406(a).

IT IS SO ORDERED this 6th day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LELAND STONECIPHER,

Petitioner,

vs.

LEROY L. YOUNG, ET AL,

Respondents.

No. 92-C-816-B

EOD 10/7/92

ORDER

Petitioner's motion for leave to proceed in forma pauperis reveals that he has $301.16 in his inmate accounts. Okla. Stat. tit. 57, § 563.2A(5) states that funds from an inmate's savings account may be used for fees or costs in filing a civil action. Petitioner's motion for leave to proceed in forma pauperis is therefore denied. His petition is accordingly dismissed at this time without prejudice for failure to pay the required filing fee. See Local Rule 6. The court will vacate this order and reinstate this action if Petitioner submits to the court the proper filing fee within thirty (30) days from this date.

SO ORDERED THIS 7th day of Sept., 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

CLOSED

FILED

OCT 0 2 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIE McDONALD,

Plaintiff,

vs.

GARY MAYNARD, ET AL.,

Defendants.

No. 92-C-788-E

EOD 10/7/92.

ORDER

Plaintiff's application for leave to proceed in forma pauperis reveals that he has $509.75 in his inmate savings account. Okla. Stat. tit. 57, § 563.2A(5) states that funds from an inmate's savings account may be used for fees or costs in filing a civil action. Plaintiff's motion for leave to proceed in forma pauperis is therefore denied. His complaint is accordingly dismissed at this time without prejudice for failure to pay the required filing fee. See Local Rule 6.

The court notes that Plaintiff's complaint is not on the court-authorized civil rights complaint form. If Plaintiff wishes to further pursue this action, he should file a new action on the proper court-authorized civil rights complaint form (see Local Rule 5(A)), and submit the proper $120.00 filing fee. The Clerk shall send Plaintiff the proper civil rights complaint form.

SO ORDERED THIS 2d day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TED EZELL,

Petitioner,

vs.

BOBBY BOONE, ET AL,

Respondents.

No. 92-C-831-B

EOD 10/7/92

ORDER

Petitioner's motion for leave to proceed in forma pauperis reveals that he has $12.50 in his inmate draw account and $283.60 in his inmate savings account. Petitioner's motion for leave to proceed in forma pauperis is therefore denied. His petition is accordingly dismissed at this time without prejudice for failure to pay the required filing fee. See Local Rule 6. The court will vacate this order and reinstate this action if Petitioner submits to the court the proper filing fee within thirty (30) days from this date.

SO ORDERED THIS 2nd day of Oct., 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOSS EINSTEIN -(Accountability) Burns,

Plaintiff,

vs.

WILLIAM A. BLAKELEY, for TCEB (Election Board, Tulsa Cnty, Tulsa, OK),

Defendant.

Case No. 92-C-654-B

O R D E R

This matter comes on for consideration of Defendant William A. Blakeley's Motion To Dismiss pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure, for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, and also pursuant to 28 U.S.C. § 1915(d).

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. **Conley v. Gibson**, 355 U.S. 41 (1957). Motions to dismiss under Rule 12(b), Fed.R.Civ.P. admit all well-pleaded facts. **Jones v. Hopper**, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. **Olpin v. Ideal National Ins. Co.**, 419 F.2d 1250 (10th Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

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The Court concludes Plaintiff's pleadings are totally without merit, are frivolous and fail to state any claim upon which relief can be granted. Further, the Court concludes this Court does not have subject matter jurisdiction. Lastly, the Court concludes the Defendant, an Assistant District Attorney for Tulsa County, State of Oklahoma, is absolutely immune from any liability herein if the Court had subject matter jurisdiction and if the pleadings stated a claim upon which relief could be granted.

Defendant's Motion To Dismiss should be and the same is hereby SUSTAINED.

IT IS SO ORDERED this 6th day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. SLIGAR,

Plaintiff,

vs.

DENNIS FRIES,

Defendant.

No. 92-C-819-B

EDO 10/7/92

ORDER

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted. However, Plaintiff's complaint shall be dismissed as frivolous at this time.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed forward with a plaintiff who is being allowed to proceed in forma pauperis. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id. at 1834, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing

vexatious suits under Federal Rule of Civil Procedure 11." Id. at 1833. Consequently, courts have the responsibility to dismiss lawsuits which are baseless, frivolous, or malicious. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id. at 1831.

Plaintiff names Tulsa County District Attorney Fries as his sole defendant. In his request for relief, he asks for $25,000,000 in punitive damages. His allegations revolve around the district attorney's involvement in state court criminal proceedings against him.

However, Prosecutors are entitled to absolute immunity for their quasi-judicial actions undertaken within the scope of their authority. Imbler v. Pachtman, 424 U.S. 409 (1976). The courts have broadly defined the scope of this immunity. Hammond v. Bales, 843 F.2d 1320, 1321-1322 (10th Cir. 1988). Plaintiff's allegations against Defendant Fries involve prosecutorial duties and functions done in his capacity as a prosecutor. Consequently, the doctrine of absolute immunity clearly precludes recovery by Plaintiff against him.

Accordingly, Plaintiff's complaint is frivolous and is hereby dismissed without prejudice.

SO ORDERED THIS 30 day of Sept, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. SLIGAR,

Plaintiff,

vs.

B.R. BEASLEY,

Defendant.

No. 92-C-810-B

EOD 10/7/92

ORDER

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted. However, Plaintiff's complaint shall be dismissed without prejudice at this time.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed forward with a plaintiff who is being allowed to proceed in forma pauperis. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id., at 1834, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the

costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11." Id., at 1833. Consequently, courts have the responsibility to dismiss lawsuits which are baseless, frivolous, or malicious. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id., at 1831.

Plaintiff names Tulsa County District Judge Beasley as his sole defendant. In his request for relief, he asks for $25,000,000 in punitive damages. His allegations revolve around the judge's involvement in state court criminal proceedings against him.

The United States Supreme Court has recognized the doctrine of absolute immunity for "officials whose special functions or constitutional status requires complete protection from suit." Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Judges are clearly among the officials who are entitled to such absolute immunity. Without such immunity judges would be subject to harassment or intimidation for decisions which adversely affect participants to a previous lawsuit. Absolute immunity, therefore, inures to the benefit of the public, "whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." Pierson v. Ray, 386 U.S. 547, 554 (1967). Consistent with the underlying purpose of the doctrine, it is firmly established law that judges have absolute immunity, in actions brought pursuant to §1983, from liability for damages for

acts committed within the apparent scope of their judicial duties. Id.; Stump v. Sparkman, 435 U.S. 349, 356 (1978). Plaintiff's allegations against defendant Beasley concern actions taken by him in his judicial capacity. Consequently, the doctrine of absolute immunity clearly precludes recovery by Plaintiff against Defendant Beasley.

Accordingly, Plaintiff's complaint is frivolous and is hereby dismissed without prejudice.

SO ORDERED THIS 30th day of Sept., 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICKKE LEON GREEN,

Plaintiff,

vs.

ELDON SIMPSON, ET AL,

Defendants.

No. 92-C-785-E

EOD 10/7/92

ORDER

Plaintiff filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a "Bivens" complaint. Plaintiff's motion for leave to proceed in forma pauperis has been granted. However, Plaintiff's action shall be dismissed without service as frivolous.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed with a plaintiff who is being allowed to commence an in forma pauperis action. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id. at 329, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing

vexatious suits under Federal Rule of Civil Procedure 11." Id. at 327.

Consequently, courts have the responsibility to dismiss lawsuits which are frivolous or malicious. A complaint is frivolous where it lacks an arguable basis either in law or in fact. Id. at 325. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id. at 324.

The Supreme Court recently revisited Neitzke in Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728 (1992). Denton emphasizes that a court is not bound to accept without question the truth of a plaintiff's allegations. Id. at 1733. The Court held that a dismissal under § 1915(d) is entrusted to the discretion of the court entertaining the in forma pauperis action, and should only be reviewed for an abuse of discretion. Id. at 1734.

Applying Neitzke and Denton to the case at hand, this court finds that Plaintiff's complaint lacks an arguable basis in law and in fact, and should be dismissed as frivolous. Plaintiff names as defendants court reporter Eldon Simpson, and five unknown members of the State Board of Examiners of Shorthand Reporters. Plaintiff alleges that Simpson refused to transcribe the proceedings of Plaintiff's six day civil trial, and that the Board failed to supervise or discipline Simpson.

Reviewing Plaintiff's entire complaint, this court concludes that Plaintiff's allegations are delusional and baseless. In

addition, it is clear that Defendants are absolutely immune from suit. See, e.g., Antoine v. Byers & Anderson, 950 F.2d 1471 (9th Cir. 1991).

Accordingly, Plaintiff's complaint is frivolous and is hereby dismissed without prejudice.

SO ORDERED THIS 2d day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICKKE LEON GREEN,)
)
Plaintiff,)
)
vs.) No. 92-C-773-B
)
THOMAS R. SEYMOUR, ET AL,)
)
Defendants.)

FILED
OCT 6 - 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER EOD 10/6/92

Plaintiff filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, a civil rights complaint pursuant to 42 U.S.C. § 1985 and § 1986 (actually a "Bivens" action), and a supplemental complaint. Plaintiff's motion for leave to proceed in forma pauperis has been granted. However, Plaintiff's action shall be dismissed without service as frivolous.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed with a plaintiff who is being allowed to commence an in forma pauperis action. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id. at 329, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of

bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11." Id. at 327.

Consequently, courts have the responsibility to dismiss lawsuits which are frivolous or malicious. A complaint is frivolous where it lacks an arguable basis either in law or in fact. Id. at 325. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id. at 324.

The Supreme Court recently revisited Neitzke in Denton v. Hernandez, ___ U.S. ___, 112 S.Ct. 1728 (1992). Denton emphasizes that a court is not bound to accept without question the truth of a plaintiff's allegations. Id. at 1733. The Court held that a dismissal under § 1915(d) is entrusted to the discretion of the court entertaining the in forma pauperis action, and should only be reviewed for an abuse of discretion. Id. at 1734.

Applying Neitzke and Denton to the case at hand, this court finds that Plaintiff's complaint lacks an arguable basis in law and in fact, and should be dismissed as frivolous. Plaintiff alleges that Tulsa attorney Thomas Seymour conspired with various Tenth Circuit Court of Appeals judges to violate Plaintiff's civil rights. Plaintiff alleges that Defendants acted out of racism, and in retaliation because Plaintiff had terminated Seymour as his attorney.

Plaintiff alleges no competent facts to support his claim of

a conspiracy, nor does he allege any competent facts to support his claims of racial discrimination or a retaliatory animus on the part of Defendants. The court finds that Plaintiff's claims are fanciful, delusional, and malicious.

In addition, Plaintiff has not adequately alleged a conspiracy to support a finding that attorney Seymour was a federal actor. Further, the Tenth Circuit judges are afforded absolute judicial immunity. Plaintiff's claims are factually and legally frivolous, and vexatious and malicious as well.

Accordingly, Plaintiff's complaint is hereby dismissed without prejudice.

SO ORDERED THIS 2nd day of Oct., 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHANE CAMERON ROBERTS,

Plaintiff,

vs.

DAVID MOSS, et al.,

Defendants.

No. 92-C-771-B

10/6/92

ORDER

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted. However, Plaintiff's complaint shall be dismissed without prejudice at this time.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed forward with a plaintiff who is being allowed to proceed in forma pauperis. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id., at 1834, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the

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costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11." Id., at 1833. Consequently, courts have the responsibility to dismiss lawsuits which are baseless, frivolous, or malicious. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id., at 1831.

Plaintiff is currently in Tulsa County Jail. He is awaiting state court trial there, and claims his right to a speedy trial has been violated. Plaintiff requests compensatory and punitive damages, as well as the dismissal of the state criminal charges against him.

The major obstacle barring any federal review of McDaniel's allegations at this time is the Younger abstention doctrine. Younger v. Harris, 401 U.S. 37 (1970) requires that federal courts, absent extraordinary circumstances, refrain from interfering with ongoing state criminal proceedings. "The objection [in Younger] is to unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts." Oshea v. Littleton, 414 U.S. 488, 500 (1974).

The court also notes that Plaintiff's claims fall within the core of habeas corpus. If Plaintiff is convicted in state court, he must then exhaust his state court remedies regarding his conviction before raising his claims in a federal habeas corpus action. See,

e.g., Rose v. Lundy, 455 U.S. 509 (1982). Plaintiff's claims are not ripe for review at this time. Plaintiff's complaint shall be dismissed without prejudice, should he wish to bring an action at a more appropriate time.

Accordingly, Plaintiff's complaint is hereby dismissed without prejudice.

SO ORDERED THIS 30 day of Sept., 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LORI G. MCKENZIE,

Plaintiff,

vs.

RENBERG'S, INC. and ROBERT L. RENBERG,

Defendants.

Case No. 92-C-398-B

O R D E R

Before the Court for consideration is a Motion to Dismiss the Plaintiff's Third and Fifth Claims for Relief filed on behalf of the Defendants, Renberg's, Inc. and Robert L. Renberg.

Plaintiff, Lori G. McKenzie, was employed by Renberg's from July, 1984, to September, 1991, last serving as the Personnel Director. She alleges she was wrongfully terminated on September 20, 1991, because of her sex, her pregnancy and in retaliation for refusing to violate the Fair Labor Standards Act ("FLSA"). Plaintiff has set out five claims for relief in her complaint. The sufficiency of the third claim, a common law tort claim for wrongful termination, and the fifth claim, a common law tort claim for intentional infliction of emotional distress, are at issue in this Order.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957).

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Motions to Dismiss under Fed.R.Civ.P. 12(b) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied,* 397 U.S. 1074 (1970).

Plaintiff's Third Claim for Relief

Plaintiff's third claim for relief attempts to state an Oklahoma common law cause of action for wrongful termination of an at-will employment contract. Plaintiff contends she was terminated in retaliation for her opposition to violations of the Fair Labor Standards Act by Renberg's.

> ... Plaintiff alleges she was terminated by Renberg's in violation of the public policy of the State of Oklahoma: (a) because Plaintiff refused to continue a personnel compensation system which violated the Fair Labor Standards Act; (b) because she refused to prepare and maintain false personnel records in violation of the Fair Labor Standards Act; (c) because she recommended that Renberg's adopt a new system of personnel compensation that complied with the Fair Labor Standards Act; and (d) in order to cover up Renberg's and Robert Renberg's past violations of the Fair Labor Standards Act and to permit them to continue to violate the Act in the future.

(Plaintiff's Complaint, p. 6).

The general rule is that an employer may discharge an at-will[1] employee "for good cause, for no cause or even for cause morally

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[1] Under the American common law rule, when the length of the master/servant relationship is unspecified by contract, either the employer or employee can terminate the employment without liability. Hinson v. Cameron, 742 P.2d 549, 552 (Okla. 1987). Oklahoma recognizes this "at-will" employment doctrine. Id., 742 P.2d at 552, n. 6.

wrong, without being guilty of legal wrong." Burk v. K-Mart Corp., 770 P.2d 24,26 (Okla. 1989). However, this terminable-at-will doctrine is not absolute. Id. In Burk, the Oklahoma Supreme Court adopted a public policy exception to the at-will termination rule.

> We thus follow the modern trend and adopt today the public policy exception to the at-will termination rule in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law. We recognize this new cause of action in tort. ... An employer's termination of an at-will employee in contravention of a clear mandate of public policy is a tortious breach of contractual obligations.
> ...
> Accordingly, we believe the circumstances which present an actionable tort claim under Oklahoma law is where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy.

Burk, 770 P.2d at 28.

The Oklahoma Supreme Court has recognized that a discharge in retaliation for an employee exposing some wrongdoing by the employer falls within the public policy exception. Hinson v. Cameron, 742 P.2d 549,552-553 (Okla. 1987)[2]; Tate v. Browning-Ferris, Inc., 833 P.2d 1218 (Okla. 1992)(racially discriminatory

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[2] Although Hinson was decided two years prior to Burk, the Hinson court listed five "nationally recognized" pubic policy exceptions to the general at-will employment rule: (a) dismissal for refusing to participate in an illegal activity; (b) dismissal for performing an important public obligation; (c) exercising a legal right or interest; (d) dismissal for exposing some wrongdoing by the employer; and (e) dismissal for performing an act that public policy would encourage or, for refusing to do something the public policy would condemn, when the discharge is coupled with a showing of bad faith, malice or retaliation.

conduct that leads to a retaliatory discharge upon an employee's complaint is actionable under Burk). Plaintiff alleges she was discharged in retaliation for exposing Renberg's wrongdoings and for refusing to participate in Renberg's continued violations of the law.[3]

An employer may not require an employee to violate a constitutional or statutory provision with impunity. If an employee refuses to act in an unlawful manner, the employer would be violating public policy by terminating the employee for such behavior. Tate v. Pepsi-Cola Metropolitan Bottling Co., Inc., 32 Empl. Prac. Dec. 33,951, 1983 WL 549 (E.D.Wis. 1983).

Taking Plaintiff's allegations as true, as the Court is required to do, Plaintiff's discharge for exposing wrongdoing and refusing to participate in such wrongdoing, was certainly contrary to public policy. The Court concludes that Plaintiff has sufficiently stated a Burk claim for tortious employment termination.

Defendants argue that even if the termination was in violation of public policy, the Court should dismiss this Burk cause of action because (1) Oklahoma's statutory remedies are exclusive, or (2) the Fair Labor Standards Act preempts all state remedies.

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[3] Plaintiff's complaint clearly relies upon the FLSA as the basis for the public policy that was violated. However, Plaintiff now argues that the public policy comes from the Oklahoma Minimum Wage Act, Okla. Stat. tit. 40, §197.1 et seq., which partially incorporates the FLSA.

Defendants first argue that the statutory criminal penalties[4] are the exclusive remedy for retaliation against an employee who files a wage and hour complaint. In a similar case, the Oklahoma Supreme Court recently held that Oklahoma's antidiscrimination statute is not the exclusive remedy for a racially motivated or retaliatory discharge and thus does not prevent a Burk claim. Browning Ferris, 833 P.2d at 1225.

The Browning-Ferris court set forth the law in Oklahoma regarding the exclusivity of statutory remedies.

> By statutory mandate the common law remains in full force in this state, unless a statute explicitly provides to the contrary. Oklahoma law does not permit legislative abrogation of the common law by implication; rather, its alteration must be clearly and plainly expressed. An intent to change the common law will not be presumed from an ambiguous, doubtful or inconclusive text. A presumption favors the preservation of common-law rights. Where the common law gives a remedy, and another is provided by statute, the latter is merely cumulative, unless the statute declares it to be exclusive. (citations omitted).

833 P.2d at 1225-26. The court specifically stated that its holding

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[4] The Oklahoma Statutes provide:

> A. It shall be a misdemeanor for any employer ... to discharge, penalize or in any other manner discriminate against any employee because:
>
> 1. The employee has filed a complaint with his employer, or the Commission of Labor or his authorized representative, to enforce any provision of Sections 71 through 198.2 of this title;
>
> ...
>
> C. Every person convicted of violating a prohibition of this section shall be fined not less than Fifty Dollars ($50.00) nor more than Two Hundred Dollars ($200.00) or imprisoned in the county jail for not less than five (5) days nor more than thirty (30) days, or both.

Okla. Stat. Ann. tit. 40, §199 (West 1986)

was limited to Oklahoma's antidiscrimination statute, and that it was not deciding whether Okla. Stat. tit. 40, §199 was intended to be exclusive. However, the Browning-Ferris analysis is equally appropriate here.

In Browning-Ferris, the Court looked at a number of factors but primarily relied on the lack of "textually demonstrable legislative intent to make the [statutory] remedies for racial discrimination exclusive."[5] 833 P.2d at 1230. In the instant case, the Defendant has provided no basis for finding legislative intent to make the statutory criminal penalties the exclusive remedy for retaliatory discharge. It is therefore presumed that the statutory remedies are cumulative and the common law remedies are preserved. The Court concludes that Okla. Stat. tit. 40, §199 does not provide the exclusive remedy for retaliation against an employee who points out the employer's illegal activities and refuses to participate in such activities.

The Defendant next argues that Oklahoma's common law tort remedies are pre-empted by 29 U.S.C. §215(a)(3) of the Fair Labor Standards Act, which protects employees from retaliation for opposing unlawful wage and hour practices. That section provides:

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[5] The Court cited two examples of statutes with sufficient "textually demonstrable legislative intent."

Section 12 of the Workers' Compensation Act provides: "The liability prescribed ... shall be exclusive and in place of all other liability of the employer ... at common law or otherwise, for such injury ...."

The Governmental Tort Claims Act, 51 O.S.1981 §153B, provides: "The liability of the state or political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision or employee at common law or otherwise."

> (a) ... [I]t shall be unlawful for any person ...
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

The United States Supreme Court has held that state law is pre-empted under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, in three circumstances: (1) when Congress explicitly sets forth the extent to which its enactments pre-empt state law; (2) when Congress regulates conduct in a field that Congress intended the Federal Government to occupy exclusively; and (3) when the state law actually conflicts with federal law. English v. General Electric Company, 496 U.S. 72, 78-79 (1990). Preemption is fundamentally a question of congressional intent. Id., 496 U.S. at 78.

The Defendant argues that 29 U.S.C. §215(a)(3) "was intended by Congress to occupy the entire field of retaliatory discharge for opposition to unlawful wage and hour practices." (Defendant's Brief, p. 3). In support, Defendant points to the FLSA "saving clause", 29 U.S.C. §218(a)[6], and argues that all matters not

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[6] This section provides:
No provision of this chapter or of any order thereunder shall excuse non-compliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum work week established lower than the maximum work week established under the Act, and no provision of this Act relating to the employment of child labor shall justify non-compliance with any Federal or State law or municipal ordinance establishing a higher standard than

addressed by this section are preempted (i.e. "not saved"). Defendant argues that the savings clause does not save state laws remedying retaliation.

In Browning-Ferris, the Oklahoma Supreme Court also addressed the issue of federal preemption of Oklahoma's Burk tort. 833 P.2d 1218. The court addressed the following question, which had been certified by the United States District Court for the Western District of Oklahoma:

> Where an at-will employee terminated by a private employer files suit alleging facts that, if true, violate state and federal statutes providing remedies for employment discrimination, can the employee-plaintiff state a tort cause of action based on the same facts, pursuant to the public policy exception to the at-will termination rule, recently recognized by the Oklahoma Supreme Court in Burk v. K-Mart, 770 P.2d 24 (Okla. 1989)?

The court answered the question in the affirmative and concluded that Title VII does not preempt the state Burk tort. Several courts have held that the FLSA does not preempt state laws dealing with subjects specifically set out in the saving clause. See e.g., Webster v. Bechtel, 621 P.2d 890,897 (Alaska 1980)(Alaska law which provided for overtime payments in excess of federal law was not preempted). However, this Court is unaware of any Tenth Circuit or Supreme Court case addressing the specific issue presented in this case -- whether §215(a)(3) and §218 of FLSA

> the standard established under this Act. No provision of this Act shall justify any employer in reducing wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

preempt a state law claim for termination of an at-will employee in retaliation for refusing to violate the FLSA.

Other courts have taken various approaches. Some have suggested that FLSA does preempt such a state law action.[7] However, others have suggested that the FLSA does not preempt this entire area.[8]

This Court concludes that the FLSA was not intended by Congress to preempt all state remedies for retaliatory discharge relating to the FLSA or similar state statutes. The Court refuses to interpret the "savings clause" of the FLSA as an express or implied preemption of such state law remedies. Rather, it indicates Congress' desire to avoid occupying this entire field, and to allow

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[7] Prewitt v. Factory Motor Parts, Inc., 747 F.Supp. 560,565 (W.D.Mo. 1990)(common law wrongful discharge claim is preempted when the public policy relied upon is the policy underlying FLSA, which provides its own complete range of remedies); Spieth v. Adasen Distributing, Inc., 111 Lab.Cas. 35,176, 1989 WL 61187 (D.Ariz. 1989)(FLSA only saves state laws dealing with hours and wages of employees; §218(a) of the FLSA preempts any recovery for a claim of wrongful discharge as the FLSA remedies are all-encompassing and obviate the need to allow recovery under a separate cause of action); Wanderling v. May Dept. Stores Co., 122 Lab.Cas. 10,287, 1984 WL 3293 (D.Colo. 1984)(dismissing plaintiff's claim and holding that when the statute from which the policy for the public policy exception is derived provides the employee a remedy for the alleged violation, the public policy exception to the employment at will rule is inapplicable); Tate v. Pepsi-Cola Metro. Bottling Co., 32 Empl.Prac.Dec. 33,951, 1983 WL 549 (E.D. Wis. 1983)(FLSA provides it own exhaustive enforcement remedies and therefore the state claim is preempted); Wehr v. Burroughs Corp., 438 F.Supp. 1052, 1055 (E.D.Pa. 1977)(public policy exception to the at-will employment doctrine is only applied when there is no other remedy to protect the interests of the aggrieved employee).

[8] Maccabees Mutual Life Ins. Co. v. Perez-Rosado, 641 F.2d 45 (1st Cir. 1981)(the FLSA does not implicitly prohibit state regulation by occupying the whole field and leaving no room for supplementary state provisions); Doctors Hospital, Inc. v. Silva Recio, 558 F.2d 619 (1st Cir. 1977).

broader state remedies that do not conflict with the FLSA. Plaintiff has sufficiently stated a Burk claim and such claim is not preempted by the FLSA.

Plaintiff's Fifth Claim for Relief

The Plaintiff in her Fifth Claim for relief has alleged:

> The actions of Defendants Renberg's and Robert Renberg in terminating the Plaintiff because of her sex and pregnancy, in violation of public policy, in violation of state and federal statutes, in contravention of assurances given her that there was nothing wrong with her job performance and that she would be counselled prior to any discipline, and without notice and opportunity to be heard in breach of long-established company policy, constitutes intentional acts so outrageous as not to be condoned by society and, because of which, Plaintiff has lost income and benefits and has suffered significant emotional distress, humiliation and damage to her reputation ....

Plaintiff contends that this allegation is sufficient to state a cause of action for intentional infliction of emotional distress and that not enough discovery has been conducted to provide more specific allegations.

The Plaintiff has failed to allege any conduct on the part of the Defendants other than the act of discharging the Plaintiff. Certainly, the Plaintiff would be aware of, and could have pled, any conduct by the Defendants during her termination that was "outrageous", if any such conduct occurred.

It is clear a termination in violation of public policy by itself is not sufficient "outrageous" conduct to create an intentional infliction of emotional distress claim. Eddy v. Brown,

715 P.2d 74 (Okla. 1986) and Pytlik v. Professional Resources Limited, 887 F.2d 1379 (10th Cir. 1989).

For the reasons stated above, the Defendant's Motion to Dismiss the Plaintiff's Third Claim for Relief is DENIED and the Defendant's Motion to Dismiss the Plaintiff's Fifth Claim for Relief is GRANTED.

IT IS SO ORDERED THIS 2nd DAY OF ~~September~~ Oct, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHANE C. ROBERTS,

Plaintiff,

v.

TULSA COUNTY COURT,

Defendant.

92-C-516-B

ORDER

This order pertains to Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983. (Docket #3)[1]. On August 10, 1992, this court granted Plaintiff thirty (30) days to perfect service on the Defendant or show cause why his complaint should not be dismissed for failure to prosecute.

Plaintiff has failed to perfect service and has not responded to the court's order. Plaintiff's Civil Rights Complaint (Docket #3) is dismissed for failure to prosecute.

Dated this 30 day of September, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

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CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 6 - 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RICHARD ROCHAM McDANIEL, JR.,

Plaintiff,

vs.

MARK SHURWOOD, et al.,

Defendants.

No. 92-C-772-B

EOD 10/6/92

ORDER

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted. However, Plaintiff's complaint shall be dismissed without prejudice at this time.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed forward with a plaintiff who is being allowed to proceed in forma pauperis. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id., at 1834, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the

costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11." Id., at 1833. Consequently, courts have the responsibility to dismiss lawsuits which are baseless, frivolous, or malicious. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id., at 1831.

Plaintiff is currently in Tulsa County Jail and he raises claims regarding his upcoming state court trial. He does not request civil rights relief in his request for relief, and it appears he wishes release from custody. Thus, this action falls within the core of habeas corpus, and the court shall treat his complaint as a petition for a writ of habeas corpus rather than a civil rights complaint.

The major obstacle barring any federal review of McDaniel's allegations at this time is the Younger abstention doctrine. Younger v. Harris, 401 U.S. 37 (1970) requires that federal courts, absent extraordinary circumstances, refrain from interfering with ongoing state criminal proceedings. If Petitioner's request for relief were granted, then future defendants not happy with their state court proceedings could delay their trials simply by turning to the federal courts for relief. "The objection [in Younger] is to unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts." Oshea v.

Littleton, 414 U.S. 488, 500 (1974).

The court also notes that if Plaintiff is convicted in state court, he must then exhaust his state court remedies regarding his conviction before raising his claims in a federal habeas corpus action. See, e.g., Rose v. Lundy, 455 U.S. 509 (1982). Plaintiff's claims are not ripe for review at this time. Plaintiff's complaint shall be dismissed without prejudice, should he wish to bring an action at a more appropriate time.

Accordingly, Plaintiff's complaint is hereby dismissed without prejudice.

SO ORDERED THIS 30th day of Sept, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 6 - 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RICHARD ROCHAM McDANIEL, JR.,

Petitioner,

vs.

MARK SHURWOOD-HAROLD GOOD,

Respondents.

No. 92-C-769-B

EDO 10/6/92

ORDER

Petitioner has filed with the court a motion for leave to proceed in forma pauperis and a petition for a writ of habeas corpus. Petitioner's motion for leave to proceed in forma pauperis is hereby granted.

Petitioner raises grounds for relief regarding his upcoming state court trial. As such, he is not currently in custody pursuant to the judgment of a state court pursuant to 28 U.S.C. § 2254(a).

In addition, a major obstacle barring any federal review of Petitioner's allegations is the Younger abstention doctrine. Younger v. Harris, 401 U.S. 37 (1970) requires that federal courts, absent extraordinary circumstances, refrain from interfering with ongoing state criminal proceedings. If Petitioner's request for relief were granted, then future defendants not happy with their state court proceedings could delay their trials simply by turning to the federal courts for relief. "The objection [in Younger] is to unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts." Oshea v.

Littleton, 414 U.S. 488, 500 (1974).

In addition, the court notes that if Petitioner is convicted in state court, he must then exhaust his state court remedies regarding his conviction before raising his claims in a federal habeas corpus action. See, e.g., Rose v. Lundy, 455 U.S. 509 (1982). Petitioner's claims are not ripe for review at this time.

Accordingly, Petitioner's application for a writ of habeas corpus is hereby dismissed without prejudice.

SO ORDERED THIS 30 day of Sept, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEE EUAL HARDT,

Petitioner,

vs.

RON CHAMPION, ET AL.,

Respondents.

No. 92-C-774-E

EOD 10/6/92

ORDER

Petitioner's application for leave to proceed in forma pauperis reveals that he has $412.19 in his inmate savings account. Okla. Stat. tit. 57, § 563.2A(5) states that funds from an inmate's savings account may be used for fees or costs in filing a civil action. Petitioner's motion for leave to proceed in forma pauperis is therefore denied. His petition is accordingly dismissed at this time without prejudice for failure to pay the required filing fee. See Local Rule 6.

If Petitioner wishes to further pursue this action, he should file a new action on the proper court-authorized petition for a writ of habeas corpus form (see Local Rule 5(A)), and submit the proper $5.00 filing fee. The Clerk shall send Plaintiff the proper petition for a writ of habeas corpus form.

SO ORDERED THIS 2nd day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

CLOSED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL R. PRESLEY,
Petitioner,

vs.

RON CHAMPION, et al.,
Respondents.

No. 92-C-759-E

FILED

OCT 6 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

EOD 10/6/92

ORDER

Now before the court is Petitioner's motion for leave to proceed in forma pauperis and application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner's motion for leave to proceed in forma pauperis is hereby granted.

Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Bryan County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more properly addressed in that district.

Accordingly, pursuant to 28 U.S.C. § 2241(d), Petitioner's application for a writ of habeas corpus is hereby transferred to the Eastern District of Oklahoma for all further proceedings.

IT IS SO ORDERED this 29th day of Sept., 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES F. QUINLAN,

Plaintiff,

vs.

KOCH OIL COMPANY, a division of KOCH INDUSTRIES, INC.,

Defendant.

Case No. 90-C-295-B

AMENDED JUDGMENT

After trial by the Court and Jury, the Honorable Thomas R. Brett presiding, and the issuance of orders on motions for summary judgment, now, therefore, upon the verdict and orders on summary judgment and to finalize as to all issues in this matter,

IT IS ORDERED, ADJUDGED AND DECREED

That, pursuant to the Court's order dated May 13, 1991, and for the reasons stated in the order, plaintiff, James F. Quinlan recover, pursuant to 52 O.S. §540, of Defendant, Koch Oil Company as interest $244,269.22 (which is the difference between the amount of interest on payments due to plaintiff, James F. Quinlan for oil purchased at the rate of 12% compounded annually from July 1, 1980, or as payments became due, if after July 1, 1980, and the amount of $78,054.47 which Defendant, Koch Oil Company paid to Plaintiff, James F. Quinlan as interest on payments due to Plaintiff, James F. Quinlan for oil purchased at the simple annual interest rate of 6% from July 1, 1980, or as payments became due, if after July 1,

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1980); and

That, pursuant to the Jury's verdict, and the Court's ordered remittitur herein, Plaintiff, James F. Quinlan recover of Defendant, Koch Oil Company the sum of $44,536.55 as actual damages and $44,536.55 as punitive damages, with post-judgment interest thereon at the rate of 4.11% annually (28 U.S.C. §1961) from the date of July 14, 1992, and costs of this action, if timely applied for pursuant to Local Rule 6. Any claim for attorneys fees, if applicable, should be filed pursuant to Local Rule 6.

Issued on this 2nd day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 6 1992

Richard M. [illegible] Clerk
U.S. DISTRICT COURT

BILL R. HENSLEY,

Petitioner,

vs.

RON CHAMPION, ET AL.,

Respondents.

No. 92-C-763-E

EOD 10/6/92

ORDER

Petitioner's application for leave to proceed in forma pauperis reveals that he has $292.18 in his inmate savings account. Okla. Stat. tit. 57, § 563.2A(5) states that funds from an inmate's savings account may be used for fees or costs in filing a civil action. Petitioner's motion for leave to proceed in forma pauperis is therefore denied. His petition is accordingly dismissed at this time without prejudice for failure to pay the required filing fee. See Local Rule 6.

If Petitioner wishes to further pursue this action, he should file a new action on the proper court-authorized petition for a writ of habeas corpus form (see Local Rule 5(A)), and submit the proper $5.00 filing fee. The Clerk shall send Plaintiff the proper petition for a writ of habeas corpus form.

SO ORDERED THIS 29th day of Sept., 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. SLIGAR,

Plaintiff,

vs.

ANTONIO HANSEN, ET AL,

Defendants.

No. 92-C-783-B

EOD 10/6/92

ORDER

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted. However, Plaintiff's complaint shall be dismissed as frivolous at this time.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed forward with a plaintiff who is being allowed to proceed in forma pauperis. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id. at 1834, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing

vexatious suits under Federal Rule of Civil Procedure 11." Id. at 1833. Consequently, courts have the responsibility to dismiss lawsuits which are baseless, frivolous, or malicious. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id. at 1831.

Plaintiff names as defendants two jurors involved in his criminal trial. In his request for relief, he asks for $25,000,000 in damages from each defendant.

The United States Supreme Court has recognized the doctrine of absolute immunity for persons whose special functions or constitutional status requires complete protection from suit. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Jurors are clearly among the persons who are entitled to such absolute immunity. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976).

Accordingly, Plaintiff's complaint is frivolous and is hereby dismissed without prejudice.

SO ORDERED THIS 30 day of Sept, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. SLIGAR,

Plaintiff,

vs.

JOHN YOUNG, ET AL,

Defendants.

No. 92-C-782-E

FILED
OCT 6 - 1992
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EOD 10/6/92

ORDER

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted. However, Plaintiff's complaint shall be dismissed as frivolous at this time.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed forward with a plaintiff who is being allowed to proceed in forma pauperis. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id. at 1834, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing

vexatious suits under Federal Rule of Civil Procedure 11." Id. at 1833. Consequently, courts have the responsibility to dismiss lawsuits which are baseless, frivolous, or malicious. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id. at 1831.

Plaintiff names as defendants two jurors involved in his criminal trial. In his request for relief, he asks for $25,000,000 in damages from each defendant.

The United States Supreme Court has recognized the doctrine of absolute immunity for persons whose special functions or constitutional status requires complete protection from suit. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Jurors are clearly among the persons who are entitled to such absolute immunity. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976).

Accordingly, Plaintiff's complaint is frivolous and is hereby dismissed without prejudice.

SO ORDERED THIS 29th day of September, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. SLIGAR,

Plaintiff,

vs.

KANDACE HAMILTON, ET AL,

Defendants.

No. 92-C-781-B

FILED

OCT 6 - 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EOD 10/6/92

ORDER

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted. However, Plaintiff's complaint shall be dismissed as frivolous at this time.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed forward with a plaintiff who is being allowed to proceed in forma pauperis. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id. at 1834, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing

vexatious suits under Federal Rule of Civil Procedure 11." Id. at 1833. Consequently, courts have the responsibility to dismiss lawsuits which are baseless, frivolous, or malicious. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id. at 1831.

Plaintiff names as defendants two jurors involved in his criminal trial. In his request for relief, he asks for $25,000,000 in damages from each defendant.

The United States Supreme Court has recognized the doctrine of absolute immunity for persons whose special functions or constitutional status requires complete protection from suit. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Jurors are clearly among the persons who are entitled to such absolute immunity. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976).

Accordingly, Plaintiff's complaint is frivolous and is hereby dismissed without prejudice.

SO ORDERED THIS 30th day of Sept, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. SLIGAR,

Plaintiff,

vs.

JACK HOLT, ET AL,

Defendants.

No. 92-C-780-B

EOD 10/6/92

ORDER

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted. However, Plaintiff's complaint shall be dismissed as frivolous at this time.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed forward with a plaintiff who is being allowed to proceed in forma pauperis. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id. at 1834, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing

vexatious suits under Federal Rule of Civil Procedure 11." Id. at 1833. Consequently, courts have the responsibility to dismiss lawsuits which are baseless, frivolous, or malicious. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id. at 1831.

Plaintiff names as defendants two jurors involved in his criminal trial. In his request for relief, he asks for $25,000,000 in damages from each defendant.

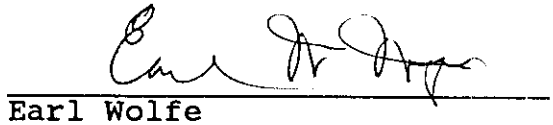
The United States Supreme Court has recognized the doctrine of absolute immunity for persons whose special functions or constitutional status requires complete protection from suit. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Jurors are clearly among the persons who are entitled to such absolute immunity. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976).

Accordingly, Plaintiff's complaint is frivolous and is hereby dismissed without prejudice.

SO ORDERED THIS 29 day of Sept., 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:



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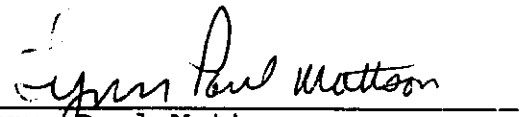

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CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. SLIGAR,

Plaintiff,

vs.

LAVON KASTNER, ET AL,

Defendants.

No. 92-C-779-B

EOD 10/6/92

ORDER

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted. However, Plaintiff's complaint shall be dismissed as frivolous at this time.

In Neitzke v. Williams, 490 U.S. 319 (1989), the Supreme Court recognized that a court is faced with two somewhat opposing responsibilities when determining which actions shall proceed forward with a plaintiff who is being allowed to proceed in forma pauperis. First, a court must be sure that it complies with the "over-arching goal [of] the in forma pauperis statute: 'to assure equality of consideration for all litigants.'" Id. at 329, quoting Coppedge v. United States, 369 U.S. 438, 447 (1962). Commensurate with that responsibility, however, is the realization that § 1915(d) "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing

vexatious suits under Federal Rule of Civil Procedure 11." Id. at 327. Consequently, courts have the responsibility to dismiss lawsuits which are baseless, frivolous, or malicious. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id. at 324.

Plaintiff names as defendants two jurors involved in his criminal trial. In his request for relief, he asks for $25,000,000 in damages from each defendant.

The United States Supreme Court has recognized the doctrine of absolute immunity for persons whose special functions or constitutional status requires complete protection from suit. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Jurors are clearly among the persons who are entitled to such absolute immunity. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976).

Accordingly, Plaintiff's complaint is frivolous and is hereby dismissed without prejudice.

SO ORDERED THIS 2nd day of Oct., 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. SLIGAR,

Plaintiff,

vs.

STANLEY SMITH, ET AL,

Defendants.

No. 92-C-778-E

FILED

OCT 6 - 1992

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EOD 10/6/92

ORDER

Plaintiff has filed with the court a motion for leave to proceed in forma pauperis pursuant 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is hereby granted. However, Plaintiff's complaint shall be dismissed as frivolous at this time.

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vexatious suits under Federal Rule of Civil Procedure 11." Id. at 1833. Consequently, courts have the responsibility to dismiss lawsuits which are baseless, frivolous, or malicious. "Dismissals on these grounds are often made sua sponte prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." Id. at 1831.

Plaintiff names as defendants two jurors involved in his criminal trial. In his request for relief, he asks for $25,000,000 in damages from each defendant.

The United States Supreme Court has recognized the doctrine of absolute immunity for persons whose special functions or constitutional status requires complete protection from suit. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). Jurors are clearly among the persons who are entitled to such absolute immunity. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976).

Accordingly, Plaintiff's complaint is frivolous and is hereby dismissed without prejudice.

SO ORDERED THIS 29th day of Sept., 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHANE C. ROBERTS,

Plaintiff,

v.

TULSA COUNTY COURT,

Defendant.

92-C-516-B

ORDER

This order pertains to Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983. (Docket #3)[1]. On August 10, 1992, this court granted Plaintiff thirty (30) days to perfect service on the Defendant or show cause why his complaint should not be dismissed for failure to prosecute.

Plaintiff has failed to perfect service and has not responded to the court's order.

Plaintiff's Civil Rights Complaint (Docket #3) is dismissed for failure to prosecute.

Dated this 30 day of September, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
MALONEY-CRAWFORD, INC.,	)	Bky. No. 92-00157-C
	)	
Debtor.	)	
	)	
NATIONAL COOPERATIVE REFINERY ASSOCIATION,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 92-C-275-B
	)	
MALONEY-CRAWFORD, INC.,	)	
	)	
Appellee.	)	

ORDER

This order pertains to the appeal of National Cooperative Refinery Association ("NCRA") of the Order of the U. S. Bankruptcy Court for the Northern District of Oklahoma dated March 20, 1992, styled "Order on Objection to Agreed Order Authorizing Emergency Use of Cash Collateral and Granting Additional or Replacement Liens and Objection to Bethlehem Steel's Request for Order Requiring the Debtor to Pay Out Certain Funds"'.

The debtor, Maloney-Crawford, Inc. ("M-C"), is engaged in the manufacture, construction and fabrication of steel tanks and vessels. It entered into an agreement in September of 1991 to construct a steel tank in McPherson, Kansas for NCRA. M-C purchased steel from Bethlehem Steel Corporation ("Bethlehem") for use in constructing the tank for NCRA. The purchases of steel were made pursuant to the terms of a Limited

Consignment Agreement dated September 15, 1991, between M-C and Bethlehem under which Bethlehem took a security interest in the purchased steel. On January 17, 1992, M-C commenced this bankruptcy case under Chapter 11 of the United States Bankruptcy Code and has been operating since that time as debtor in possession. On February 3, 1992, M-C filed a Motion for Authority to Reject Executory Contract, seeking to reject its contract with NCRA. The motion was granted.

Following the commencement of the bankruptcy case, M-C received checks in the amounts of $22,895.66 and $20,767.47 from NCRA, payable jointly to M-C and Bethlehem. Pursuant to an agreement between M-C and Bethlehem, the checks were endorsed and certificates of deposit were purchased in the respective amounts in the name of M-C and Bethlehem at Commercial Bank & Trust Company of Tulsa.

On January 17, 1992, when this bankruptcy case was filed, pursuant to 11 U.S.C. § 363, the Bankruptcy Court entered an "Agreed Order Authorizing Emergency Use of Cash Collateral and Granting Additional or Replacement Liens". On February 14, 1992, NCRA filed its objection to the Agreed Order, asserting a right to the funds in recoupment or setoff, or alternatively, that it had a right to direct application of those funds in accordance with Oklahoma lien trust law. In its March 20, 1992 Order, the Bankruptcy Court found that NCRA had no right to the funds in question under any of the theories asserted, and the funds were subsequently paid to M-C and used in the ordinary course of its business.

This appeal concerns the legal issue of the trust character of the proceeds involved. The Bankruptcy Court's legal conclusions are subject to de novo review by this court. Hall v. Vance, 887 F.2d 1041, 1043 (10th Cir. 1989).

Under Bankruptcy Rule 8005[1], a stay of a Bankruptcy Court's order is required upon appeal. NCRA did not seek a stay of the order being appealed and the disputed proceeds have been disbursed, making the appeal moot. The mootness doctrine provides that an appeal should be dismissed when events occur that prevent the reviewing court from granting a litigant any effective relief. Colorado Interstate Gas Co. v. Federal Energy Regulatory Comm'n, 890 F.2d 1121, 1126 (10th Cir. 1989). This court is unable to grant relief to NCRA, because the proceeds have been disbursed and no construction payments exist on which to impress a trust, even if the court overruled the Bankruptcy Order.

The Tenth Circuit Court of Appeals has stated that parties appealing an order under 11 U.S.C. § 363 must obtain a stay of the order pending the appeal, as the property "may be sold to a 'good faith purchaser,' removing the property from the jurisdiction of the courts and rendering moot the appeal from the order authorizing the sale." In re Bel Air Assocs., Ltd., 706 F.2d 301, 304-05 (10th Cir. 1983) (emphasis added).

NCRA claims the appeal is not moot because issues of dischargeability and priority of debt yet to be resolved in the bankruptcy case turn on the applicability of Oklahoma lien trust law. NCRA "merely seeks to ensure that the trust character of the NCRA proceeds . . . is maintained, and thus that those proceeds are not property of the estate - but rather belong to the holders of lienable claims against NCRA." (Opening Brief of Appellant, pg. 8). It also claims it intends to file a state court action against the principals of M-C for defalcation of M-C under lien trust law and if this appeal is found to be moot, the

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[1] Bankruptcy Rule 8005 states in part that "[a] motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. . . . [T]he bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest."

Bankruptcy Court's decision will be raised by the defendants as a res judicata defense. These arguments are not persuasive. The Bankruptcy Court will be able to determine remaining issues without applying Oklahoma's lien trust law, which it has determined to be inapplicable, and Kansas does not have a lien trust statute, so a case alleging breach of trust cannot be brought there.

In addition, NCRA does not have a lienable claim against M-C and thus has no standing to invoke the construction trust fund statute, 42 Okla.Stat. §§ 152[2] and 153[3]. These sections provide that funds received by a contractor or subcontractor are held in trust to pay all lienable claims which are due and owing or become due and owing by such contractor under that building or remodeling contract. They also require that the trust funds created must be used to pay lienable claims and may not be utilized for any other

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[2] 42 Okla.Stat. § 152 states:

§ 152. Proceeds of building or remodeling contracts, mortgages or warranty deeds as trust funds for payment of lienable claims

(1) The amount payable under any building or remodeling contract shall, upon receipt by any contractor or subcontractor, be held as trust funds for the payment of all lienable claims due and owing or to become due and owing by such contractors or subcontractors by reason of such building or remodeling contract.

(2) The monies received under any mortgage given for the purpose of construction or remodeling any structure shall upon receipt by the mortgagor be held as trust funds for the payment of all valid lienable claims due and owing or to become due and owing by such mortgagor by reason of such building or remodeling contract.

(3) The amount received by any vendor of real property under a warranty deed shall, upon receipt by the vendor, be held as trust funds for the payment of all valid lienable claims due and owing or to become due and owing by such vendor or his predecessors in title by reason of any improvements made upon such property within four (4) months prior to the delivery of said deed.

[3] 42 Okla.Stat. § 153 states in part as follows:

§ 153. Payment of lienable claims

(1) The trust funds created under Section 152 of this title shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims due and owing or to become due and owing shall have been paid.

* * *

(4) The existence of such trust funds shall not prohibit the filing or enforcement of a labor, mechanic or materialmen's lien against the affected real property by any lien claimant, nor shall the filing of such lien release the holder of such funds from the obligations created under this section or Section 152 of this title.

purpose.

The Oklahoma Supreme Court addressed this issue in In re Tefertiller, 772 P.2d 396 (Okla. 1989). In that case the court found that a subcontractor was required to properly perfect a mechanic's and materialmen's lien to create a lienable claim and invoke the Oklahoma trust provisions found in §§ 152 and 153. The court determined that only a party with a perfected lien could avail itself of the construction trust fund statutes. It rejected any expansion of the statutes to situations not expressly covered therein. The court had previously held that: "The trust [created under §§ 152 and 153] is for the benefit of mechanics and materialmen with 'lienable' claims arising out of their furnishing labor or materials to the construction project." Shankle Equip. Co., Inc. v. Liberty Nat'l Bank & Trust Co. of Okla. City, 569 P.2d 965, 966 (Okla. 1977).

Thus the only "lienable claims" which give rise to §§ 152 and 153 are those "specifically enumerated in 42 O.S. 1981 §§ 141-153." See In re Weaver, 41 B.R. 649, 654 (Bankr. W.D.Okla. 1984). Liens created by other laws are not sufficient to invoke the provisions of §§ 152 and 153. Id. A lienable claim under Kansas law is insufficient to invoke the Oklahoma construction trust statutes. Since NCRA has no lienable claim against M-C, NCRA cannot claim to be a beneficiary under §§ 152 and 153 and cannot seek enforcement of those sections.

NCRA argues that, because it is the owner of real property on which the improvements were being constructed, it is in the class of those protected by the construction trust fund statutes. It points out that the Oklahoma Supreme Court found that the construction trust fund statutes are to be liberally construed in McGlumphy v.

Jetero Constr. Co., Inc., 593 P.2d 76, 81 (Okla. 1978).[4] However, in Tefertiller, the court refined that basic notion:

> We generally agree that the construction trust statutes require a liberal construction. However, and more important, lien law legislation cannot be extended to cases not within its scope. Liberal construction is accorded to the enforcement stage after it is clearly established that the right has attached, but not so in the process of determining the question of whether a lien does exist in contemplation of law. This is the settled rule that governs all statutory liens in derogation of the common law.

772 P.2d at 398 (emphasis in original).

The Oklahoma lien statutes do not apply to a construction site in the state of Kansas. In Nuclear Corp. of America v. Hale, 355 F.Supp. 193, 197 (N.D. Tex.), aff'd 479 F.2d 1045 (5th Cir. 1973), the court determined that Oklahoma lien law would apply to a construction project in Oklahoma and that Texas lien law would apply to a construction project in Texas. The court reached this result even though the project was located in Oklahoma, but the contract was entered into, and the parties resided in, Texas. Id. at 197. The court concluded that "[a] materialmen's lien is a creature of the law of the state where the real property, benefitted by the materials, is situated and that law governs the mode of its operation." Id. at 196 (citing In re Willax, 93 F.2d 293, 295 (2d Cir. 1937)).

NCRA cites the case of Swan Air Conditioning Co. v. Crest Construction Corp., 568 P.2d 1330 (Okla.Ct.App. 1977), in which the court resolved a lien dispute involving a construction project in Arkansas. This case was not a published opinion and is therefore

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[4] In McGlumphy, 593 P.2d at 82, the Oklahoma Supreme Court ruled that the trust fund statutes are "an integral part of the lien laws of the State of Oklahoma." The court applied the Oklahoma construction trust fund statutes to an Oklahoma construction project and applied Arkansas law to an Arkansas construction project because the contracts at issue contained choice of law provisions which were applicable. Id. at 82-83.

not binding or precedential under 20 Okla.Stat. § 30.5. The Court of Appeals applied the Oklahoma construction trust fund statutes only because no party pled that the law of Arkansas be applied to the case. Id. at 1335. The court noted that, had the parties raised the foreign law issue, it would have applied the lien law of Arkansas to the Arkansas project. Id.

The court in Swan Air concluded that the construction trust statutes not only protect a lienholder, but also the injustice of a double payment by an owner, trustee, contractor, or subcontractor. Id. The court distinguished between mechanic's liens, which attach to realty, and the statutory trust fund, which, "by a liberal interpretation of the statute", arises when payment is made by an owner to a contractor or subcontractor. Id. at 1335-36, n.3. Relying on this distinction, the court stated "[b]ecause the parties were all Oklahoma residents and the trust funds were properly before an Oklahoma court, application of Oklahoma law is reasonable." Id. The Swan court relied on a Delaware case, State v. Tabasso Homes, 28 A.2d 248 (Dela. 1942), which held that a statutory trust is supplementary to lien laws. Id. at 1336. However, as already noted, the court in McGlumphy, 593 P.2d at 84, found that lien trust provisions are integral parts of Oklahoma's lien law. The Swan decision is not persuasive to this court.

While the Oklahoma courts in McGlumphy, 593 P.2d at 1334, and earlier in Bohn v. Divine, 544 P.2d 916, 920 (Okla.Ct.App. 1975), found that the state lien trust statutes are "protective" of the rights of all to whom an obligation is owed for the funds' proper disbursement, this does not give those without liens standing under the statute to bring claims. Because those with liens are allowed to bring suit, others who seek the proper

disbursement of funds are benefitted.

NCRA has gone to great lengths to persuade the court that general conflict of law principles should be used to apply Oklahoma lien law to the property in Kansas. However, there is a well-settled choice of law rule that the lien law of the state where the realty is located applies, and the Oklahoma Supreme Court has ruled that the lien trust statutes are an integral part of Oklahoma's lien laws. Oklahoma's lien trust statutes do not apply to this case where the construction took place in Kansas, the owner of the construction project was a Kansas corporation, the contract was entered into by a Kansas Corporation, NCRA, and all parties did business in Kansas on the project.

It is ordered that the Bankruptcy Court's decision of March 20, 1992 is affirmed.

Dated this 30th day of Sept., 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES F. QUINLAN,

Plaintiff,

vs.

KOCH OIL COMPANY, a division of KOCH INDUSTRIES, INC.,

Defendant.

Case No. 90-C-295-B

O R D E R

This matter comes on for consideration of Defendant's Motion For Judgment As A Matter Of Law Or, In The Alternative, For New Trial, pursuant to Rules 50 and 59, F.R.Civ.P..

After a six day jury trial a verdict was rendered in favor of Plaintiff, James F. Quinlan (Quinlan) and against the Defendant, Koch Oil Company (Koch) in the amount of $44,536.55 plus punitive damages in the amount of $244,663.04. A Judgment in conformance with such verdict was entered July 14, 1992.

Initially Koch argues that, even if an oil purchaser can owe a fiduciary duty to a royalty owner, as concluded in the Court's previous Orders, Koch did not in the present matter, "assume the handling of Quinlan's share of production." Koch avers that only Quinlan's agent, i.e. the lease operator, "handled" Quinlan's share of production from the oil runs.

The Court concludes Koch quibbles with phrases on this issue. It is accurate that the several lease operators did, on all

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occasions, sell Quinlan's share of oil production to oil purchasers[1] such as Koch and therefore "handled" Quinlan's share of production by selling same. However, the Court, by concluding that Koch "assume[d] the handling of Quinlan's share of production", was referring to the money proceeds derived from the sale of such share of production. Therefore, Koch "handled" Quinlan's money[2], a fact which the Court concluded gave rise to an implied obligation to pay and a fiduciary duty to insure Quinlan was aware Koch was withholding the money proceeds for an allegedly legitimate reason. The Court finds this argument unpersuasive.

Koch also argues Quinlan knew it and other oil purchasers required a signed division order or a showing of marketable title prior to payment of oil purchase proceeds. The trial did disclose that Quinlan was generally aware of these industry standards. But, this again begs the predicate of the controversy. Before a division order can be signed, must come knowledge of the accumulated fund the division order addresses and knowledge of the existence of the division order itself. Likewise the issue of marketable title is germane only when the entitled owner knows what he will gain by a marketable title. Quinlan's lack of knowledge and Koch's superior knowledge is the very essence of the fiduciary relationship herein. The finders of fact determined Koch breached its fiduciary duty to

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[1] Quinlan did not, as was his right under the oil lease, take his royalty in kind, i.e. actually take delivery of his proportionate share of the oil produced.

[2] Koch, as well as other oil purchasers, commonly identify this money as "oil royalty" as opposed to "working interest" payments.

Quinlan's damage.

Koch further assails the Court's previous determination that a fiduciary relationship exists, citing lack of specific case authority. The Court concludes its earlier ruling on this issue is sufficient.

Earlier, the Court was of the view there existed unresolved factual matters regarding the Division Order(s) which could impact Koch's fiduciary duty to Quinlan. The jury determined these matters essentially in Quinlan's favor.[3]

Lastly, Koch again argues that notice of the division order to the lease operator constituted notice to Quinlan. The Court having declined to adopt this view in previous Orders, again declines.

The Court concludes Koch's arguments relating to the issue of its fiduciary duty to Quinlan, or lack of it, are not persuasive and should be overruled.

The Court next addresses Koch's argument regarding the payment of statutory interest under 52 O.S. §540. Koch argues that it did not violate the statute in issue since marketable title was not in issue but simply was not shown by Quinlan.[4] This essentially sophistic argument is equally unpersuasive. The record establishes

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[3] One of the factual issues remaining regarding the Division Orders was whether Koch's forwarding of Division Order(s) to Quinlan, only through the intermediary lease operators, reasonable under the circumstances? The jury apparently thought not. The question was: Having not received back the signed Division Order(s) should Koch have done more to fulfill its fiduciary duty towards Quinlan? Apparently the jury thought it should.

[4] Koch asserts that it voluntarily paid Quinlan 6% interest notwithstanding its alleged lack of legal obligation to pay any interest.

that Koch failed to pay Quinlan because of an unsigned division order, a practice that did not survive 52 O.S. §540. **Hull v. Sun Refining and Marketing Co.**, 789 P.2d 1272 (Okla. 1989).

52 O.S. §540 A. provides, in part, as follows:

> Provided, however, that in those instances where such proceeds cannot be paid because the title thereto is not marketable, the purchasers of such production shall cause all the proceeds due such interest to earn interest at the rate of six percent (6%) per annum to be compounded annually, calculated from date of first sale, until such time as the title to such interest has been perfected.

52 O.S. §540 D. provides as follows:

> D. Any said first purchasers or owner of the right to drill and produce substituted for the first purchaser as provided herein that violates this section shall be liable to the persons legally entitled to the proceeds from production for the unpaid amount of such proceeds with interest thereon at the rate of twelve percent (12%) per annum to be compounded annually, calculated from date of first sale.

As noted in a previous Order, the record adequately demonstrates that Koch personnel did not consider Quinlan's title unmarketable but merely stale. Koch admitted Quinlan's monies were suspended due to Quinlan's failure and refusal to provide Koch with evidence, in the form of a signed Division Order or other documentation, of his proportionate interest in such production. But the larger issue was and is: did Quinlan know of the requirement.

This Court, in an earlier Order, observed that Koch's purchase of Plaintiff's production created at least an implied contract and

duty to pay, supplementing § 540's directive to pay.

As observed earlier, the existence of an implied contract to pay would, of necessity, have long existed at common law since the widely recognized obligation of oil purchasers to pay royalty owners did not await the passage of § 540, effective beginning July 1, 1980.

The Court again concludes a fiduciary relationship with royalty owners is a duty to not use contrived grounds as a reason for not paying; therefore, a withholding of funds for "title" reasons must be a *legitimate* title dispute, rather than a disingenuous reason. Title 52 O.S. § 540 A. states: ". . . Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association. . .".

The jury in essence considered the question: Did Koch make a legitimate effort to inform Quinlan that his funds were being suspended for a given reason (whatever that reason might be), and answered it in the negative.

The Court remains of the view an obligation exists at common law *viz-a-viz* fiduciary duty when an oil purchaser assumes the "handling" of a royalty owner's share of production to insure the royalty owner has been given fair notice such money is being withheld because of an alleged defective title, or to confirm continuing good title, or to prove his proportionate share in a new unit, or to warrant title.

In the Court's view, as expressed in earlier Orders, at least an implied agreement existed between Koch and Quinlan that the former would pay the latter any royalty revenues properly due.

Further, 52 O.S. § 540, effective July 1, 1980, imposed a statutory duty upon Koch to pay Quinlan any amount properly due him for royalty. The Court reads § 540 as not only setting the *time* for payment to begin (no later than 6 months after first sale of production) and the interest ramifications (either 6% for legitimate title disputes or 12% for violators of the statute) but it also reinforces the common law obligation *to pay*, as seen from the statute's initial statement: "A. The proceeds from the sale of oil or gas production from any oil or gas well shall be paid to persons legally entitled thereto . . .". Koch's argument that it has no obligation to pay any interest under §540 is not persuasive and should be overruled.

Koch next argues punitive damages were inappropriate because a plaintiff, under 23 O.S. §9, can only recover punitive damages if the action for a breach of an obligation does not arise from contract. Koch, decrying the Court's earlier reliance upon **Lowrance v. Patton**, 710 P.2d 108 (Okla.1985), argues that case is actually authority to the contrary, supporting Koch's view that a fiduciary relationship must be based upon some form of agreement, either express or implied "from which it can be said the minds have been met to create a mutual obligation". Id. at 112.

The Court finds no inconsistency in the **Lowrance** holding and its previously expressed views regarding an implied duty to pay a royalty owner for oil purchased from the lease operator and an overriding fiduciary duty to make reasonable efforts to insure that the royalty owner knows there is money to be paid subject to

division order and/or a showing of title. In **Zenith Drilling Corp. v. Internorth, Inc.**, 869 F.2d 560, 565 (10th Cir.1989), the Court stated:

> Generally, Oklahoma law prohibits the award of punitive damages in a contract action, Okla.Stat. tit. 23, § 9(A), and the district court denied them in the instant case. The Oklahoma courts have allowed punitives, however, even when the parties' relationship basically is contractual, if the breaching party's act constitute "an independent, willful tort." **Z.D. Howard Co. v. Cartwright**, 537 P.2d 345, 347 (Okla.1975); **see also Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.**, 700 P.2d 1023, 1027 (Okla.Ct.App.1983).
>
> * * * * *
>
> We . . . affirm the district court's denial of punitive damages. Count I of Zenith's complaint asserts only breach of contract. Count II asserts that InterNorth committed a tort, but only to support its punitive damages claim. Zenith does not argue that actual damages are due for commission of that tort. This court has held, interpreting Oklahoma law, that a breach of contract alone cannot support an award of punitive damages; the plaintiff must recover damages for a tort before recovering punitive damages. **Norman's Heritage Real Estate Co. v. Aetna Casualty & Sur.Co.**, 727 F.2d 911, 916 (10th Cir.1984). (Emphasis supplied)

In an earlier Order the Court determined Koch, as purchaser of Quinlan's oil, has at least an implied obligation to pay but that such obligation does not preclude the existence of other relationships, i.e. a fiduciary relationship. Koch's argument throughout this case has been essentially that it has no contractual obligation to pay funds it holds; that it has no fiduciary duty to pay funds it holds; and that it can only be

statutorily compelled to pay either 6% or 12% interest on suspended funds, depending upon the state of title (Koch now argues it is not legally required to pay any interest under §540). Implicit in Koch's new argument is a view that reads this section as giving oil purchasers an option to deliberately retain oil revenues, risking no interest penalty. The Court disagrees, reading § 540 as determinative of what the *interest* penalty will be and concluding that § 540 does not prevent recovery of actual and/or punitive damages if violation of a fiduciary relationship is proven.

The Court concluded earlier that a jury could find, based upon the existence of both an implied contractual and fiduciary relationship between Quinlan and Koch, that a breach thereof could give rise to damages both actual and punitive.[5] In the present matter, contra to **Zenith**, *supra*, the jury returned a verdict for actual damages for Koch's violation of its fiduciary duty to Quinlan, thereby laying the predicate for punitive damages.

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[5] The Court, in an earlier Order, distinguished the present matter from **J.R. Bridgeford & Co., Syndicate A-51 v. Koch Oil Company**, W.D. Ok., CIV-90-1554-W, wherein Judge West's Order of November 29, 1990, determined that the "lease agreement" between Plaintiff and Koch, and the alleged breach thereof, was a contract action only, there being no "allegations in the instant case" (that) "rise to the level of creating an independent, willful tort outside the contract relationship". The **Bridgeford** Court also determined the obligation created by § 540 was incorporated in the contractual relationship of the parties. In the present matter the Court concluded a fiduciary relationship exists, and that failure to adequately inform a royalty owner, if proven, that specific funds were being suspended because a division order (sent to the lessee/operator and of which the royalty owner was unaware) remained unsigned, could be found by a properly instructed jury to constitute the breach thereof, which, if combined with proven damage, could result in a recovery for Plaintiff, including punitive damages. The jury herein made such finding.

Koch next avers that punitive damages, even if appropriate in this matter, should have been limited by the Court to the amount of actual damages because there was no showing by clear and convincing evidence that Koch was guilty of conduct evincing a wanton or reckless disregard for the rights of Quinlan nor of oppression, fraud or malice, actual or presumed. Koch argues the Court never made the predicate statutory finding.[6] In the same context Koch also argues the Court has previously concluded that Quinlan's cause of action arose after 1986; therefore, the amended 23 O.S. §9 cap limit (requiring the predicate finding) would apply herein.

An examination of the Court's oral statements[7] at the

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[6] 23 O.S. §9 provides in pertinent part:
". . . Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply."

[7] The transcript of the June 25, 1992, instructions conference reveals the following: MR. SEARS: "In other words, if this claim arose before 1986, he's out, because the statute of limitation bars it. If it arose after 1986, then the statute would put a cap on the punitive damages within the Court's judgment, of course." THE COURT: "Well, along that line, I really think that presents a tough question to me. And the best way for the Court to handle that would be to take a lot closer look at that after they come back and not limit the punitive at this time. And then when they come back if I'm convinced your argument is right and punitive should exceed 121,000, just cut it back to the 121, would be the best way to do that. Because now, if I limit it, we try it to the jury, and I'm ultimately wrong in having limited it, I've got to retry this case on punitive damages. And if I retry this case on punitive damages, I'll have to hear every bit of the evidence. In other words, I'll have to spend another week in this matter and so will you. And to get this case in context where we'll only have to try it once, I think it's probably sensible to not limit the punitive damage at

instructions conference held June 25, 1992, causes the Court to conclude that: (1) the Court did make a predicate finding (assuming one is required, i.e. if Quinlan's cause of action arose after the 1986 amendment of §9; and (2) the Court, by inference, entered a ruling that Quinlan's cause of action did arise after the 1986 amendment, otherwise a predicate finding would be unnecessary.

In clarification, if needed, the Court concludes Quinlan's cause of action arose after the 1986 amendment because the record is abundantly clear Quinlan was unaware of the existence of the suspended funds and Koch's lack of reasonable effort (as determined by the jury) to advise him of same. However, the Court is not convinced the record demonstrates "that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed."

The Court concludes, under the strictures of 23 O.S. §9 that the punitive damage award in favor of Quinlan should be reduced, by remittitur, to an amount equal to the amount of actual damages, to-wit: $44,536.55. An Amended Judgment will be entered simultaneously herein granting Plaintiff James F. Quinlan judgment against Defendant Koch Oil Company in the amount of $44,536.55 actual damages and $44,536.55 punitive damages. Remittitur is ordered in the amount of $200,126.49.

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this time and then take care of that post-trial if it should be done. That way we'll just try the lawsuit once on punitive damages and eliminate the potential of twice." MR. SEARS: "I understand, Your Honor."

The Court concludes Koch's argument that Quinlan's payment to heirfinders is analogous to paying an attorney fee or a collection agency fee to collect a debt and therefore Quinlan is without damage as a matter of law, is without merit. Further, the Court concludes Koch's objections to the instructions given (and those requested by Koch but not given) provide no basis for granting a new trial or entering judgment in favor of Koch as a matter of law.

In summary, the Court denies Koch's Motion For Judgment As A Matter Of Law Or, In The Alternative, For New Trial, except that the Court orders a punitive damage remittitur in the $200,126.49. An amended judgment consistent with this Order will be entered simultaneously herein.

IT IS SO ORDERED this 2nd day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY K. HENSHAW, & ORVILLE M. HENSHAW, Husband & Wife, Plaintiff,	
vs	**NO. 92-C-204-B**
LARRY FUGATE, a Creek County Deputy Sheriff, **BRUCE DUNCAN,** City of Sapulpa Police Officer, **3 UNKNOWN CREEK COUNTY DEPUTY SHERIFFS, 3 UNKNOWN CITY OF SAPULPA POLICE OFFICERS** Defendants	

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiffs, Mary K. Henshaw and Orville M. Henshaw, acting by and through Counsel of Record and hereby file this Stipulation of Dismissal Without Prejudice. This stipulation is being made pursuant to Rule 41 (a)(1).

In support of this Stipulation, the Plaintiffs would show this Court that opposing parties have been contacted and have stipulated to this dismissal without prejudice and that the respective parties are to bear their own cost.

Respectfully submitted,

RAYMOND S. ALLRED, OBA #11747
RICHARDSON, MEIER & STOOPS
5727 South Lewis, Suite 520
Tulsa, Oklahoma 74105
(918) 492-7674

ATTORNEY FOR PLAINTIFFS

APPROVED AS TO FORM AND SUBSTANCE:

JOHN H. LIEBER
ATTORNEY FOR DEFENDANT
BRUCE DUNCAN

LANTZ MCCLAIN
CREEK COUNTY DISTRICT ATTORNEY
ATTORNEY FOR DEFENDANT
LARRY FUGATE

CERTIFICATE OF MAILING

I hereby certify that on this 1 day of October, 1992, a true and correct copy of the above and foregoing instrument was mailed, postage prepaid to:

John H. Lieber
2727 E. 21st Street, Suite 200
Tulsa, OK 74114

Lantz McClain
Creek County District Attorney
P. O. Box 1006
Sapulpa, OK 74067

RAYMOND S. ALLRED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ASBESTOS HANDLERS, INC.,
an Oklahoma corporation,

Plaintiff,

vs.

SUN COMPANY, INC. (R & M)
an Oklahoma corporation,

Defendant.

CASE NO. 92-C-509-B

O R D E R

This matter comes on for consideration of Defendant Sun Company, Inc.'s (Sun) Motion To Dismiss Plaintiff's Second and Third Causes of Action.

This action was originally filed in District Court in and for Tulsa County, Oklahoma, and removed by Sun to this Court based upon diversity of citizenship with an amount in controversy exceeding $50,000.

In its Petition Plaintiff Asbestos Handlers, Inc. alleges, in its First Cause of Action, that Sun is indebted to it in the amount of $95,348.92 for good and valuable services rendered by Plaintiff to Sun including, in addition, materials, equipment and supplies; that Sun breached its contract to pay Plaintiff therefor; that Sun has tendered to Plaintiff an amount less than the amount owed. In its Second Cause of Action, Plaintiff alleges that it and Sun reached an agreement on the amount owed; that Sun, without justification or provocation, attempted to coerce and intimidate

Plaintiff with the intent to force Plaintiff to accept a lesser sum than owed by Sun; that such conduct was in wanton and reckless disregard for the rights of Plaintiff, done with malice and seeking unjust enrichment, amounting to tortious breach of contract, justifying an award of punitive damages in Plaintiff's favor. In its Third Cause of Action Plaintiff alleges the acts described in Cause One and Two were "intentional and calculated to effect emotional distress upon Plaintiff through the simultaneous infliction of financial distress", for which Plaintiff alleges it is entitled to receive actual damages.

Sun's Motion To Dismiss, joined with its Answer, was filed without supporting brief in contravention of Local Rule 15 A. Additionally, the Motion itself contains no citation of authority therein. Sun's sole argument is that "the allegations of the claimed causes of action, even if taken as true, do not allege facts for which relief could be granted".

Plaintiff has failed to respond to Sun's Motion To Dismiss.

The Court, having little to do but provide ancillary research availability for the local bar, concludes Sun's Motion To Dismiss Plaintiff's Second Cause of Action should be and the same is hereby DENIED and Sun's Motion To Dismiss Plaintiff's Third Cause of Action should be and the same is hereby GRANTED.

IT IS SO ORDERED this 6th day of October, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED SATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NIMBUS SHIPPING CORPORATION as Owner of M/T CROSBY	)	
Plaintiff,	)	
vs.	)	Case No. 92-C-839-B
SKAUGEN PETROTRANS, LTD. as Charterer of M/T CROSBY	)	
Defendant.	)	

NOTICE OF DISMISSAL AND ORDER
RELEASING ATTACHMENTS

WHEREAS, Nimbus Shipping Corporation ("Nimbus"), by its attorneys, Boone, Smith, Davis, Hurst & Dickman, has commenced this action against Skaugen PetroTrans Ltd. ("Skaugen") in the United States District Court for the Northern District of Oklahoma;

WHEREAS, Nimbus has caused Process of Maritime Attachment and Garnishment to be issued attaching the credits and effects of Skaugen in the hands of Citgo Petroleum Corporation and Phillips Petroleum Company up to $2,600,000;

WHEREAS, Skaugen has provided substitute security acceptable to Nimbus in related litigation pending in the United States District Court for the Southern District of New York and no appearance or filing of an answer or motion for summary judgment has been served by Skaugen in this action,

NOW, THEREFORE, Plaintiff hereby dismisses this action pursuant to Rule 41(A)(1) of the Federal Rules of Civil Procedure without prejudice to the action

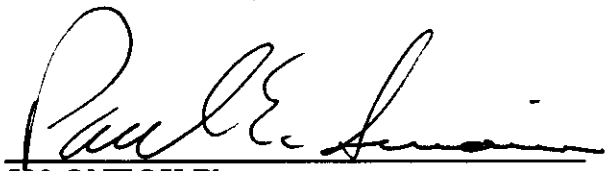
now pending between the same parties in the United States District Court for the Southern District of New York, under Docket No. 92 Civ. 6796 (JES), and it is further

ORDERED that all orders of attachment or garnishment issued herein are hereby vacated and the accounts, goods, chattels and effects of Skaugen attached in the hands of Citgo Petroleum Corporation and Phillips Petroleum Company pursuant to any such order, if any, are hereby released.

Dated: October 1, 1992.

Respectfully Submitted,

PAUL E. SWAIN, III



500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

Attorney for the Plaintiff
Nimbus Shipping Corporation

OF COUNSEL:

BOONE, SMITH, DAVIS, HURST
& DICKMAN
500 ONEOK Plaza
100 WEST FIFTH STREET
TULSA, OKLAHOMA 74103
(918) 587-0000

SO ORDERED:

/s/ THOMAS R. BRETT

United States District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of October, 1992, a full, true and correct copy of the above and foregoing instrument was mailed, via first class mail, with postage prepaid thereon, to the following:

Steve Johnson, Esq.
Phillips Petroleum Company
1101 Adams Building
Bartlesville, Oklahoma 74004

Jane Merdian, Esq.
Citgo Petroleum Corporation
6130 South Yale
Suite 612
Tulsa, Oklahoma 74136

Skaugen PetroTrans Ltd.
5847 San Felipe
Suite 4300
Houston, Texas 77057

Paul E. Swain, III

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY KAY GRISHAM, et al.,)
)
Plaintiffs,)
)
vs.) No. 91-C-966-E
)
MARY ANDERSON, et al.,)
)
Defendants.)

ORDER GRANTING MOTION TO DISMISS

The Court upon consideration of the Defendants' Motion, Plaintiffs' Response, and Defendants' Reply, together with all authorities cited by the parties does dismiss Plaintiffs' Complaint without prejudice to the filing of a future action because Plaintiffs have failed to exhaust their administrative remedies before filing this action. Plaintiffs' allegation of futility is insufficiently established.

ORDERED this 2nd day of October, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEITH R. FITZGERALD and STEVEN BELL, Plaintiffs	)	CASE NO. 92-C-224-E
v.	)	
GHP Corporation, a Colorado corporation, Defendant.	)	ENTERED ON DOCKET OCT 5 1992

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Keith R. Fitzgerald and Steven Bell, by and through their attorney of record, R. Thomas Seymour, and Defendant GHP Corporation, by and through its attorney of record, John S. Athens, hereby stipulate to the Dismissal With Prejudice of the above-styled cause pursuant to ~~your~~ Rule 41(a)(1) of the Federal Rules of Civil Procedure.

By: R. Thomas Seymour
R. Thomas Seymour

R. Thomas Seymour, Attorneys
230 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-5791

Attorneys for Plaintiff
KEITH R. FITZGERALD AND
STEVEN BELL

By: John S. Athens
John S. Athens

CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Defendant
GHP CORPORATION

IN THE UNITED SATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NIMBUS SHIPPING CORPORATION as Owner of M/T CROSBY	)	
Plaintiff,	)	
vs.	)	Case No. 92-C-839-B
SKAUGEN PETROTRANS, LTD. as Charterer of M/T CROSBY	)	
Defendant.	)	

NOTICE OF DISMISSAL AND ORDER RELEASING ATTACHMENTS

WHEREAS, Nimbus Shipping Corporation ("Nimbus"), by its attorneys, Boone, Smith, Davis, Hurst & Dickman, has commenced this action against Skaugen PetroTrans Ltd. ("Skaugen") in the United States District Court for the Northern District of Oklahoma;

WHEREAS, Nimbus has caused Process of Maritime Attachment and Garnishment to be issued attaching the credits and effects of Skaugen in the hands of Citgo Petroleum Corporation and Phillips Petroleum Company up to $2,600,000;

WHEREAS, Skaugen has provided substitute security acceptable to Nimbus in related litigation pending in the United States District Court for the Southern District of New York and no appearance or filing of an answer or motion for summary judgment has been served by Skaugen in this action,

NOW, THEREFORE, Plaintiff hereby dismisses this action pursuant to Rule 41(A)(1) of the Federal Rules of Civil Procedure without prejudice to the action

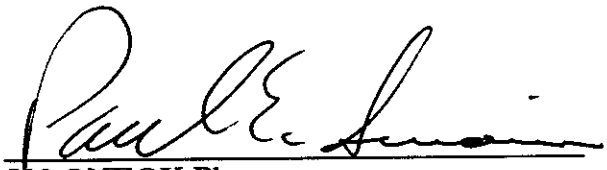
now pending between the same parties in the United States District Court for the Southern District of New York, under Docket No. 92 Civ. 6796 (JES), and it is further

ORDERED that all orders of attachment or garnishment issued herein are hereby vacated and the accounts, goods, chattels and effects of Skaugen attached in the hands of Citgo Petroleum Corporation and Phillips Petroleum Company pursuant to any such order, if any, are hereby released.

Dated: October 1, 1992.

Respectfully Submitted,

PAUL E. SWAIN, III



500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

Attorney for the Plaintiff
Nimbus Shipping Corporation

OF COUNSEL:

BOONE, SMITH, DAVIS, HURST
& DICKMAN
500 ONEOK Plaza
100 WEST FIFTH STREET
TULSA, OKLAHOMA 74103
(918) 587-0000

SO ORDERED:

United States District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of October, 1992, a full, true and correct copy of the above and foregoing instrument was mailed, via first class mail, with postage prepaid thereon, to the following:

Steve Johnson, Esq.
Phillips Petroleum Company
1101 Adams Building
Bartlesville, Oklahoma 74004

Jane Merdian, Esq.
Citgo Petroleum Corporation
6130 South Yale
Suite 612
Tulsa, Oklahoma 74136

Skaugen PetroTrans Ltd.
5847 San Felipe
Suite 4300
Houston, Texas 77057

Paul E. Swain, III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY K. HENSHAW, & ORVILLE M. HENSHAW, Husband & Wife,

Plaintiff,

vs

LARRY FUGATE, a Creek County Deputy Sheriff, **BRUCE DUNCAN,** City of Sapulpa Police Officer, **3 UNKNOWN CREEK COUNTY DEPUTY SHERIFFS, 3 UNKNOWN CITY OF SAPULPA POLICE OFFICERS**

Defendants

NO. 92-C-204-B

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiffs, Mary K. Henshaw and Orville M. Henshaw, acting by and through Counsel of Record and hereby file this Stipulation of Dismissal Without Prejudice. This stipulation is being made pursuant to Rule 41 (a)(1).

In support of this Stipulation, the Plaintiffs would show this Court that opposing parties have been contacted and have stipulated to this dismissal without prejudice and that the respective parties are to bear their own cost.

Respectfully submitted,

RAYMOND S. ALLRED, OBA #11747
RICHARDSON, MEIER & STOOPS
5727 South Lewis, Suite 520
Tulsa, Oklahoma 74105
(918) 492-7674

ATTORNEY FOR PLAINTIFFS

APPROVED AS TO FORM AND SUBSTANCE:

JOHN H. LIEBER
ATTORNEY FOR DEFENDANT
BRUCE DUNCAN

LANTZ MCCLAIN
CREEK COUNTY DISTRICT ATTORNEY
ATTORNEY FOR DEFENDANT
LARRY FUGATE

CERTIFICATE OF MAILING

I hereby certify that on this 1 day of October, 1992, a true and correct copy of the above and foregoing instrument was mailed, postage prepaid to:

John H. Lieber
2727 E. 21st Street, Suite 200
Tulsa, OK 74114

Lantz McClain
Creek County District Attorney
P. O. Box 1006
Sapulpa, OK 74067

RAYMOND S. ALLRED

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA FIXTURE COMPANY, an Oklahoma corporation,

Plaintiff,

vs.

ASK COMPUTER SYSTEMS, INC., a California corporation,

Defendant.

Case No. 90-C-747-E

JUDGMENT

This action was tried before a jury on September 8, 1992 through September 17, 1992 on Plaintiff's claims of breach of contract and breach of warranty, the Court previously having granted Defendant's Motion for Summary Judgment on Plaintiff's claims of negligence and fraud. Following trial of the breach of contract and breach of warranty claims, the jury rendered its verdict on September 17, 1992 in favor of Defendant, ASK Computer Systems, Inc., finding that the ASK MANMAN software sold to Plaintiff, Oklahoma Fixture Company, does function in accordance with ASK's published specifications, as determined by the Court.

In accordance with the jury verdict in this case and the Court's prior ruling on Defendant's Motion for Summary Judgment, the Court hereby renders judgment in favor of Defendant, ASK Computer Systems, Inc., and against Plaintiff, Oklahoma Fixture Company, on all of Plaintiff's claims in this action and hereby adjudges that Plaintiff shall have no recovery against Defendant on any of Plaintiff's claims in this action.

D\RBN\09-92429\dep

DATED this 1st day of October, 1992.

S/ JAMES O. ELLISON

CHIEF JUDGE JAMES O. ELLISON
UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:

Charles D. Harrison
HOUSTON AND KLEIN
320 South Boston Avenue, Suite 700
Tulsa, Oklahoma 74103
(918) 583-2131
ATTORNEY FOR PLAINTIFF,
OKLAHOMA FIXTURE COMPANYA

Richard B. Noulles
GABLE & GOTWALS
2000 Fourth National Bank Building
15 West Sixth Street
Tulsa, Oklahoma 74119-5447
(918) 582-9201
ATTORNEY FOR DEFENDANT,
ASK COMPUTER SYSTEMS, INC.

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT -2 1992

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JOHN T. BIELOH

Plaintiff,

v.

L.G. BALFOUR COMPANY, INC.

Defendant.

Civil Action
No. 92-C-575-E

ENTERED ON DOCKET
OCT 5 1992

STIPULATION OF DISMISSAL

Pursuant to Rule 41 of the Federal Rules of Civil Procedure the parties hereto hereby stipulate and agree that the above-captioned action be hereby dismissed with prejudice, each party to bear its own costs.

Dated: ~~September~~ October 2, 1992
Tulsa, Oklahoma

JOHN T. BIELOH

By his Attorneys,

Darrell E. Williams
CLARK & WILLIAMS
5416 South Yale
Suite 600
Tulsa, Oklahoma 74135
(918) 496-9200

L.G. BALFOUR COMPANY, INC.

By its Attorneys,

James M. Sturdivant (OBA #8273)
Richard D. Koljack, Jr. (OBA #8273)
GABLE & GOTWALS
15 West Sixth Street
Tulsa, Oklahoma 74119-5447
(918) 582-9200

WP-0329/B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE, Plaintiff,	)	
vs.	)	No. 91-C-274-E
DAVID POPLIN, et al., Defendants.	)	

ORDER AND JUDGMENT

Comes now before the Court for its consideration the Magistrate Judge's Report and Recommendation. After careful review, the Court finds the Magistrate Judge's findings and recommendations should be AFFIRMED; all pending motions are rendered moot.

ORDERED this 30th day of September, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHERRY J. WILLIAMS,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services,

Defendant.

No. 91-C-144-E

ORDER AND JUDGMENT

Comes now before the Court for its consideration Plaintiff's objection to the Magistrate Judge's report and recommendation. After careful review, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are AFFIRMED.

ORDERED this 30th day of September, 1992.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS C. GRINTER, et al.,	)	Class Action
	)	
Plaintiffs,	)	Civil Action
	)	No. 86 C 979 E
vs.	)	
	)	
ANCHOR STONE, et al.,	)	
	)	
Defendants.	)	

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiffs, by and through their attorneys, and hereby dismisses Standard Industries Division d/b/a APAC Oklahoma, Inc. in the above entitled and numbered action with prejudice to future action.

DATED this 1st Day of October, 1992.

Respectfully submitted,

CHAPEL, RIGGS, ABNEY, NEAL & TURPEN
M. David Riggs, OBA #7583
Fred Rahal, Jr., OBA #7378
Claire M. Trinidad, OBA #11428
502 West Sixth Street
Tulsa, Oklahoma 74119
(918) 587-3161

By: Fred Rahal Jr.

KHOURIE, CREW & JAEGER, P.C.
Eugene Crew
James G. Gilliland, Jr.
Jennifer Pizer
One Market Plaza, 40th Floor
Spear Street Tower
San Francisco, CA 94105

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing pleading was on the 1st day of October, 1992, mailed with proper postage affixed thereon to:

F. N. Schneider, III
Attorney at Law
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(Attorney for APAC-Oklahoma, Inc. d/b/a Standard Industries Division)

Roxann Henry, Esq.
1730 Pennsylvania Avenue N.W.
Washington, D.C. 20008
(Attorney for APAC, Inc.)

Fred Rahal, Jr.

FJR:MCCOCH-DIS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DON W. GLIDEWELL,

Plaintiff,

vs.

CITGO PETROLEUM CORPORATION,

Defendant.

No. 91-C-753-C

JUDGMENT

The court, having reviewed Defendant's Amended Motion for Summary Judgment and Brief in Support thereof and Plaintiff's Brief in Support of Response to Defendant's Amended Motion for Summary Judgment, grants to Defendant and against Plaintiff summary judgment concerning Count III of Plaintiff's Complaint which alleged intentional infliction of emotional distress. There are no material facts in dispute as to the intentional infliction of emotional distress claim; therefore, the question is one purely of law.

There are not sufficient facts to prove the elements of a cause of action for intentional infliction of emotional distress under Oklahoma law. See Eddy v. Brown, 715 P.2d 74 (Okla. 1986). This conclusion was admitted by Plaintiff in his Response Brief.

Accordingly, Defendant is granted summary judgment as against Plaintiff on Plaintiffs claim of intentional infliction of emotional distress.

DATED this 30th day of September, 1992.

(Signed) H. Dale Cook

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANK L. HOLLIER,

Plaintiff,

v.

MARVIN T. RUNYON, Postmaster General of the United States,

Defendant.

No. 92-C-387-B

J U D G M E N T

In keeping with the Order Sustaining Defendant's Motion for Summary Judgment Pursuant to Fed.R.Civ. 56, Judgment is hereby entered in favor of Defendant, Marvin T. Runyon, Postmaster General of the United States, and against the Plaintiff, Frank L. Hollier. Costs are assessed against the Plaintiff, Frank L. Hollier, if timely applied for pursuant to Local Rule 6. Each party is to pay their own respective attorney fees.

DATED this 30th day of Sept., 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANK L. HOLLIER,

Plaintiff,

v.

MARVIN T. RUNYON, Postmaster General of the United States,

Defendant.

No. 92-C-387-B

O R D E R

Before the Court for decision is Defendant's Motion to Dismiss filed pursuant to Fed.R.Civ.P. 12(b)(6). Each party has requested the Court to consider documentary evidence outside the pleadings. Therefore, after prior notice to the parties, Defendant's motion is being considered as a motion for summary judgment under Fed.R.Civ.P. 56.

The Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

Undisputed Material Facts

The Plaintiff, Frank L. Hollier ("Hollier"), received an appointment on November 3, 1990, as a part-time flexible (PTF) mail processor at the Tulsa, Oklahoma Post Office (Defendant's Exhibit 1, ¶ 2). As a PTF mail processor, Plaintiff had to successfully complete a ninety-day probationary period pursuant to Article 12.1 of the collective bargaining agreement (CBA) (Defendant's Exhibit 1, ¶ 2, and Attachment A).

Plaintiff, within the ninety-day probationary period, was issued a notice of termination dated January 10, 1991, and was discharged effective January 11, 1991 (Defendant's Exhibit 1, Attachment B). Plaintiff contacted a United States Postal Service Equal Employment Opportunity (EEO) counselor on January 25, 1991, to request pre-complaint counseling over his discharge. (Defendant's Exhibit 1, ¶ 4). The EEO counselor conferred with the parties, advised Plaintiff that she could not resolve the matter, and gave him written notice of final interview which Plaintiff signed on February 12, 1991 (Defendant's Exhibit 1, Attachment C). This notice advised Plaintiff in pertinent part that:

> "If the matters which you raised at the counseling state have not been resolved, you have the right to file a formal complaint within fifteen (15) calendar days after receipt of this notice. The complaint must be in writing (Form 2565), signed by you, and mailed or delivered to the Manager, EEO Complaints Processing, Oklahoma City Field Division, P. O. Box 26006, Oklahoma City, OK 73125-6006. Refer to the reverse side of Form 2565 for additional instructions.
>
> "The date of filing will be the date of the postmark on the envelope or, if there is no

> postmark or it is illegible, the date on which the Manager, EEO Complaints Processing receives the complaint."

(Defendant's Exhibit 1, Attachment C).

Plaintiff then filed a formal complaint of discrimination on April 1, 1991, alleging that he had been discriminated against on the bases of race (Black) and age (41) when he was terminated during probation on January 11, 1991 (Defendant's Exhibit 1, Attachment D). Thereafter, the Postal Service issued a final agency decision rejecting Plaintiff's administrative complaint of discrimination as untimely filed (Defendant's Exhibit 1, Attachment G). This decision provided in pertinent part that:

> "Title 29 CFR 1613.214 requires that the complainant, or his representative, submit his written complaint to an appropriate official within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor. The Report of Counseling indicates that you received a final interview on 2-12-91. Your formal complaint was filed on 4-1-91. As you did not comply with the prescribed regulation noted above, your complaint is rejected as untimely."

(Defendant's Exhibit 1, Attachment G).

Plaintiff next filed an appeal with the Office of Federal Operations of the Equal Employment Opportunity Commission (EEOC) which issued a decision affirming the final decision of the Postal Service rejecting Plaintiff's complaint as untimely (Defendant's Exhibit 1, Attachment H).

Plaintiff later filed with the EEOC a request to reopen and reconsider its decision which EEOC denied by decision dated March 26, 1992 (Defendant's Exhibit 1, Attachment I).

Plaintiff initiated the present action on May 6, 1992, alleging that he had been discriminated against on the basis of race and age when he was terminated.

Legal Analysis and Authorities

Herein, the Plaintiff contacted the Postal Service EEO counselor on January 25, 1991, alleging that he had been discriminated against on the basis of race (Black) and age (41) concerning his termination. Plaintiff thus satisfied the first time requirement of 29 C.F.R. §1613.214(a)(1).

In order to exhaust his administrative remedies Plaintiff was required under 29 C.F.R. §1613.214(a)(1) to submit a written complaint to an appropriate agency official within fifteen calendar days after the date of receipt of the notice of right to file a complaint. Plaintiff received the notice of final interview on February 12, 1991. (Defendant's Exhibit 1, Attachment C). This notice advised the Plaintiff of his right to file a written formal complaint and specifically stated that such complaint had to be filed within fifteen days of receipt of the notice. He was further advised that he was to mail or deliver the written formal complaint to the Manager, Equal Employment Opportunity Complaints Processing, Oklahoma City Field Division, P. O. Box 26006, Oklahoma City, Oklahoma. (Defendant's Exhibit 1, Attachment C). Pursuant to 29 C.F.R. §1613.214(a)(1)(ii), Plaintiff had until February 27, 1991, in which to file his written formal complaint of discrimination. However, such written formal complaint was not filed until April 1, 1991. It was for this reason that the Postal Service rejected

Plaintiff's administrative complaint of discrimination. (Defendant's Exhibit 1, Attachment G).

The Plaintiff asserts that the Postal Service "actively misled him in order to dissuade him from filing a formal complaint of race and age discrimination." (Plaintiff's Response, p. 3). Plaintiff also alleges that the Postal Service made an offer to re-employ him which "Plaintiff could only view as an offer of settlement." (Plaintiff's Response, p. 9). Plaintiff states that "from February 4, 1991 until May 2, 1991, [he] was actively led to believe that [the Postal Service] was going to reinstate him and place him in the mail carrier position." (Plaintiff's Response, p. 3). Plaintiff submits these facts to justify a conclusion of equitable tolling concerning timely administrative exhaustion.

Lewis Stephen Goff (Goff), Supervisor of Personnel Services of the Tulsa Postal Service, testifies by way of his declaration (Defendant's Exhibit 1 to Supplemental Memorandum filed August 24, 1992) that on January 28, 1991, he sent Plaintiff a letter in which he advised Plaintiff that his request for reinstatement was denied. (Defendant's Exhibit 1, Attachment A). Goff also stated in his declaration that he considered Plaintiff for a city carrier position on February 12, 1991, because Plaintiff was on the hiring register for the city carrier position and had to be given consideration for that position because he was a veteran. (Defendant's Exhibit 1, ¶ 5). Goff further stated that when he met with Plaintiff with regard to the city carrier position he did not know that Plaintiff had filed a complaint of discrimination over

any matter and that he never discussed settlement nor utilized the term settlement with Plaintiff at any time. (Defendant's Exhibit 1, ¶ 5).

Plaintiff asserts that the tentative offer of employment as a city carrier in February 1991, actually led him to not file his administrative complaint of discrimination within fifteen days of February 12, 1991, the date on which he received his appeal rights. However, it is clear from the record that Plaintiff knew as of March 8, 1991, that such offer had been rescinded. *See,* Defendant's Motion, Exhibit 1, Attachment E, and Plaintiff's EEO Investigative Affidavit, Answers to Questions 2, 5 Marked as Exhibit 2. The fifteen-day time limit in which to file the formal administrative complaint of discrimination, therefore, would have commenced as of March 8, 1991, and Plaintiff would have had until March 24, 1991, to file his formal complaint of discrimination. Plaintiff did not file his written formal complaint until April 1, 1991. (Defendant's Motion, Exhibit 1, ¶ 5 and Attachment D).

The assertions made in Plaintiff's response were previously rejected by the EEOC when it found in its decision of March 26, 1992, that Plaintiff failed to exhaust administrative remedies, and stated:

> "To support his argument that the February 4, 1991, call-in notice was an attempt to settle his EEO complaint, appellant would have to show that the two jobs were not separate and distinct--that the offer of the second job was related to settlement of the complaint involving the first. He has failed to bear this burden and has, instead, further illuminated the separate and distinct nature

of the two jobs.

> "The Commission finds that it was not reasonable for appellant to believe that the two jobs were related and that the second was a settlement of his EEO complaint. There are numerous facts that show appellant knew or should have known that the two jobs were not related: (a) the title of the two jobs were different (mail handler and mail carrier); (b) the duties of the two jobs were different (sorting and delivering mail); (c) at the final interview with the EEO counselor, appellant was advised of the agency's position regarding his performance; (d) in a letter dated January 28, 1991 the agency advised appellant that it would not reinstate him; (e) in his interview with the Supervisor of Personnel Services, appellant was told that he could not return as a mail handler; and (f) appellant acknowledged in his April 1, 1991, formal complaint that he failed to file within the required time period. Further, even after receiving some indication that he would not be hired pursuant to the February 4, 1991, call-in notice, appellant did not speedily act, but still delayed before filing his formal complaint. His April 1, 1991, formal complaint acknowledges that he was aware as early as March 8, 1991, that he would not pass his medical evaluation. If appellant had relied on the agency's call-in notice as a settlement of his EEO complaint, acting in good faith he should have filed his formal complaint immediately after March 8."

It is well-established that timely exhaustion of administrative remedies is a mandatory precondition to suit under Title VII. Brown v. General Services Administration, 425 U.S. 820, 832-833 (1976); Johnson v. Orr, 747 F.2d 1352, 1356 (10th Cir. 1984); and Sampson v. Civiletti, 632 F.2d 860, 862 (10th Cir. 1980).

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(c), provides that a federal employee claiming age

discrimination may seek relief through two alternative avenues. Under 29 U.S.C. § 633a(c) a plaintiff may file an administrative complaint of age discrimination and, if denied relief through this process, then institute a civil action. This was the course of relief selected by the Plaintiff. Alternatively, a plaintiff may forego the administrative process and proceed directly to federal district court, provided that he institutes a civil action within one hundred eighty days after the alleged unlawful practice occurred and files a notice of intent to sue with the EEOC at least thirty days prior to instituting a civil action.

Once the plaintiff chooses to pursue administrative remedies, as Plaintiff did herein, he must exhaust the administrative remedies prior to bringing a civil action. *See,* Wrenn v. Secretary, Department of Veteran Affairs, 918 F.2d 1073, 1078 (2d Cir. 1990), *cert. denied,* _____ U.S. _____, 113 L.Ed.2d 721 (1991); Tolbert v. United States, 916 F.2d 245, 248 (5th Cir. 1990); McGinty v. United States Department of the Army, 900 F.2d 1114, 1117 (7th Cir. 1990); and Purtill v. Harris, 658 F.2d 134, 138 (3d Cir. 1981); *cert. denied,* 462 U.S. 1131 (1983).[1]

The administrative procedures found at 29 C.F.R. § 1613.214a(1)(i) and (ii) provide in pertinent part that:

> "The agency may accept the complaint for processing in accordance with this subpart

[1] Apparently the 10th Circuit Court of Appeals has not addressed the issue of exhaustion of administrative remedies in reference to age discrimination. Wall v. United States, 871 F.2d 1540, 1546 and n. 3 (10th Cir. 1989) [dissenting opinion], cert. denied, 493 U.S. 1019 (1990).

only if:

> "(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and
>
> "(ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days after the date of receipt of the notice of the right to file a complaint."

Federal courts have required strict compliance with this requirement and have consistently dismissed Title VII actions where the plaintiff failed to exhaust administrative remedies. *See,* Johnson v. Orr, 747 F.2d at 1356; Sampson v. Civiletti, 632 F.2d at 862; and Johnson v. Bergland, 614 F.2d 415, 417-18 (5th Cir. 1980).

The facts do not support Plaintiff's contention of equitable tolling. *See,* Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042 (10th Cir.1980); Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir.1976); Wilkerson v. Siegfried Ins. Agency, Inc., 683 F.2d 344, at 348 (10th Cir.1982); Bickham v. Miller, 584 F.2d 736, 737-38 (5th Cir. 1978), and Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975). *See also,* 29 C.F.R. §1613.214(a)(1)(i). The Defendant's Motion to Dismiss, converted to a motion for summary judgment pursuant to Fed.R.Civ. 56, is hereby SUSTAINED due to Plaintiff's failure to exhaust administrative remedies.

A separate Judgment shall be entered contemporaneously herewith in favor of the Defendant and against the Plaintiff.

DATED this 30 day of Sept., 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUSANNA JOHNSON,

Plaintiff,

v.

JOSEPH A. YELENCSICS,
Executor of the Estate of
Joseph Yelencsics, Deceased,

Defendant.

CASE NO. 87-C-572-B

J U D G M E N T

In accordance with the Findings of Fact and Conclusions of Law filed this date, Judgment is hereby entered in favor of the Plaintiff, Susanna Johnson, in the amount of $158,580.02, and against the Defendant, Joseph A. Yelencsics, Executor of the Estate of Joseph Yelencsics, Deceased, and postjudgment interest at the rate of 3.13 percent per annum from the date hereon. Each party is to bear their own costs and attorney fees.

DATED this 2nd day of Oct, 1992.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUSANNA JOHNSON,

Plaintiff,

v.

JOSEPH A. YELENCSICS,
Executor of the Estate of
Joseph Yelencsics, Deceased,

Defendant.

CASE NO. 87-C-572-B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action, an accounting of partnership interests between Plaintiff, Susanna Johnson (Johnson) and Joseph Yelencsics (Yelencsics), now deceased, involves certain cattle ranching operations in Florida, Mississippi and Oklahoma, from 1972 until September 14, 1987 (the date of Joseph Yelencsics' death). Following an appeal of the first nonjury trial to the Tenth Circuit Court of Appeals, the appellate court remanded the matter for consideration of issues relating to two disputed partnership transactions which, for the purpose of convenience, will be referred to as the "$650,000 sale" and the "$5,000,000 sale."[1] These remaining issues were tried to the Court, sitting without a jury, on August 31, September 1 and September 2, 1992.

In an Agreed Pretrial Order filed August 24, 1992, the parties

[1]The "$5,000,000 sale" and the "$650,000 sale" are misnomers because, as reflected herein, there never was a $5,000,000 sale (only alleged by Plaintiff) and the "$650,000 sale" was the balance due in reference to the alleged $1,000,000 sale of the 200 head of Charolais cattle in 1973.

have set forth admitted facts and further do not contest the findings contained in this Court's Second Amended Findings of Fact and Conclusion of Law filed May 11, 1989, except those set forth in Finding 9(A) and the last sentence of Finding 9(C). After considering the evidence, legal authority and the arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law regarding the remaining two issues:

FINDINGS OF FACT

1. Susanna Johnson is a resident of the State of Florida. Throughout most of the times relevant to the partnership that is the subject of this action Susanna Johnson was a resident of the State of New Jersey.

2. Joseph Yelencsics, prior to the time of his death on September 14, 1987, was a resident of the State of New Jersey.

3. The parties have agreed that the real property in Delaware County, Oklahoma, which was purchased in September 1973 by Susanna Johnson and Joseph Yelencsics, as tenants in common, and referred to herein as the Honey Creek Ranch, is not an asset of the partnership and is not involved in this case.

4. Susanna Johnson and Joseph Yelencsics signed Articles for Co-Partnership for an Oklahoma partnership under the name of Honey Creek Ranch, Delaware County, Oklahoma, on September 15, 1975 (Plaintiff's Ex. 7), but they had been conducting a fifty-fifty cattle ranching partnership operation in Florida known as Rip Van Winkle Farms under an oral agreement since sometime in 1972.

5. The parties filed joint partnership tax returns for each

relevant year under the name of Rip Van Winkle Farms from 1971 through 1987. (Plaintiff's Ex. 12)

6. The partnership was dissolved on September 14, 1987 upon the occasion of Joseph Yelencsics' death, and both parties are entitled to a complete accounting of the assets and liabilities of the partnership.

7. Susanna Johnson took possession of most of the assets of the partnership, through her husband, James E. Johnson, after September 14, 1987.

8. The following facts are pertinent to the operation of the Joseph Yelencsics and Susanna Johnson cattle ranching partnership and a better under standing of the convoluted nature of the partnership dissolution and accounting:

> In 1973 the Honey Creek Ranch in Delaware County, Oklahoma was purchased by Joseph Yelencsics and Susanna Johnson as tenants in common as aforesaid. It is the Honey Creek Ranch (approximately 4000 acres) cattle partnership operation and transactions that are principally involved herein.
>
> James E. Johnson is the husband of Susanna Johnson. He testified he personally has no assets of any kind. As a result of a relatively small judgment rendered against him in the late 1960s, and collection efforts following, as well as his personal health problems, James E. Johnson decided to divest himself of all his assets by transferring them to his wife, Susanna Johnson, and his

children. In the early 1970s his wife was transferred his partnership interest in the Rip Van Winkle Farms and his daughter, Priscilla Oughton, and her husband, were transferred his interest in Johnson Farms of Mississippi.

While Susanna Johnson and Priscilla Oughton were the ostensible owners of such business interests as stated, James Johnson continued to run and control the businesses and made all operating decisions of the Johnson business interests. All of the Johnsons' numerous business interests had a single bank account in a New Jersey bank, and for accounting purposes, an effort was made to designate by subaccounts deposits or withdrawals from the one account to a specific business, i.e., Rip Van Winkle Farms, Johnson Farms of Mississippi, Johnson Lumber, as well as other business interests. James Johnson maintained control over the single account and all Johnson business interests represented by the account.

In the operation of the Rip Van Winkle Farms (Honey Creek), Joseph Yelencsics was the operating partner. Although he was the operating partner he lived in New Jersey, making occasional annual trips to Oklahoma and employed an on-site ranch manager. The ranch over the years was operated principally as a beef sale operation and not as a pure bred breeding herd. Susanna Johnson and James Johnson, over the fifteen-year period, made only

one or two trips to the Honey Creek Ranch in Oklahoma.

Susanna Johnson received monthly income and expense statements from Joseph Yelencsics relative to the Honey Creek Ranch operation and she supplied them to a New Jersey certified public accountant for annual preparation of the partnership tax returns.

Priscilla Oughton, although the owner of Johnson Farms of Mississippi, neither knew anything about nor was she ever consulted about its operation by her father, James Johnson. Richard Johnson, James Johnson's brother, was the on-site farm manager of Johnson Farms of Mississippi.

There is not contention herein that James Johnson was the principal of the Johnson business interests or that Susanna Johnson or Priscilla Oughton (Johnson Farms of Mississippi) were his alter ego.

9. Originally, there were five disputed partnership transactions but three of them were resolved in the first trial and appeal. The two remaining are:

(i) the 1900-2000 head of cattle sold or contributed to the partnership from 1973-1975 for the purported purchase price of $5,000,000.00;

(ii) Sale in 1973 of approximately 200 head of registered Charolais cattle to the partnership for $1,000,000.00, $650,000.00 remaining due thereon.

10. The purported $5,000,000 cattle sale or contribution claim of Plaintiff arose as follows: Plaintiff asserts that in 1973, her husband, James E. Johnson, acting on her behalf, entered into a transaction with Plaintiff's partner, Joseph Yelencsics, that approximately 1100 head of Charolais cattle (some pure blood and some mixed blood), and about 900 head of mixed cattle would be sold by Johnson Farms of Mississippi to the Johnson-Yelencsics Honey Creek Ranch Partnership, a/k/a Rip Van Winkle Farms of Florida for $5,000,000.00.

In negotiating the transaction, James E. Johnson was also acting for and on behalf of Johnson Farms of Mississippi which was owned by Priscilla Oughton and her husband. Plaintiff asserts the approximately 2,000 head of cattle were delivered over the period from 1973 to 1975 to the Honey Creek Ranch. This purported $5,000,000 transaction was never recorded on the books of the Yelencsics-Johnson partnership (Rip Van Winkle Farms of Florida) or on the books and records of Johnson Farms of Mississippi.

A dispute arose between James E. Johnson, acting on behalf of Susanna Johnson, and Joseph Yelencsics concerning the purported $5,000,000 cattle sale which centered in the value and quality of the delivered cattle. In 1976, it was determined that some of the purchased cattle, approximately 50, were infected with Bang's Disease and therefore could be sold for beef value only. The dispute between James E. Johnson and Joseph Yelencsics was never resolved before Yelencsics' death. Since Yelencsics is deceased, and there is nothing in writing memorializing the purported

$5,000,000 transaction, the Court is left to resolve the dispute from the testimony of James E. Johnson and the overall record in the case.

In order to take advantage of the $5,000,000 investment tax credit (20%), James E. Johnson determined that 1,039 (an arbitrary figure) head of the offspring or calves of the Charolais cattle delivered from the Johnson Farms of Mississippi were cattle actually involved in the purchase from Johnson Farms of Mississippi. Over the years Susanna Johnson had taken advantage of this investment tax credit.

In 1980, about seven years following the purported approximately 2,000 head of cattle purchase transaction, Susanna Johnson signed a note in the amount of $4,900,000 to her daughter, Priscilla Oughton (Johnson Farms of Mississippi), to be payable over five years in approximately equal installments at an interest rate of 6% per annum. (Plaintiff's Exhibit 13). Susanna Johnson paid Priscilla Oughton the sum of $100,000 in 1979 on said cattle purchase, thereby making the total of $5,000,000. The note has been paid by Susanna Johnson but no interest was paid thereon. It should be remembered that all of the Johnson business interests operate out of a single bank account in New Jersey so no money actually passed from Susanna Johnson to Priscilla Oughton, her husband, or Johnson Farms of Mississippi. It was a paper recorded transaction for tax purposes.

From the evidence presented, the Court concludes that the $5,000,000 figure placed as the value of the cattle purchased from

Johnson Farms was an arbitrary figure arrived at by James E. Johnson with no particular bearing on the true value of the cattle.[2] Shortly before his death on September 14, 1987, Joseph Yelencsics acknowledged generally to his son, Joseph A. Yelencsics, that the Johnson-Yelencsics partnership received a significant number of cattle from 1973 to 1975 from the Johnson Farms of Mississippi, but denied there was any agreement relative to the $5,000,000 purchase price. Joseph Yelencsics indicated that the dispute concerning the value and quality of the cattle was ongoing and yet to be resolved.

11. The Court concludes that from 1973 to 1975, there were approximately 1400 head of cattle shipped and sold by Johnson Farms of Mississippi to the Johnson-Yelencsics Partnership, a/k/a Rip Van Winkle Farms of Florida. The Court concludes approximately 500 of these cattle were pure blood Charolais, broken down into 30 bulls and approximately 470 heifers, plus approximately 900 head of grade cattle. The Court arrives at the 1400 total cattle by taking into consideration that of the approximately 1900 head of cattle on the Honey Creek Ranch in 1975 (Plaintiff's Exhibit 11, I-13, Farmers Production credit total), the number over 1400 were either being boarded for other owners, had been shipped from the state of

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[2]On July 29, 1991, the United States Tax Court in the case of Johnson v. Commissioner, 62 T.C.M. (CCH) 254 (1991) concluded that the purported 1973 $5,000,000 cattle sale transaction from Johnson Farms of Mississippi to the Johnson-Yelencsics Partnership, a/k/a Rip Van Winkle Farms of Florida was a sham transaction. The trial court judgment became final in July 1992. The Tax Court case is now in the appeal stage. (Defendant's Exhibits 61, 62).

Florida and previously owned by Rip Van Winkle Farms of Florida or were part of the 200 head of cattle mentioned in the next paragraph. The Court concludes the true value of the approximately 1400 head of cattle sold by Johnson Farms of Mississippi to the Johnson-Yelenciscs Partnership, a/k/a Rip Van Winkle Farms of Florida is $760,000.00.[3] (Such is arrived at by computing 900 head of cattle at $222.20 each; 470 Charolais purebred cattle at $1,000.00 each and 30 Charolais purebred bulls at $3,000 each).

12. The sale in 1973 of approximately 200 head of registered purebred Charolais cattle by Johnson Farms of Mississippi to the Johnson-Yelencsics Partnership, a/k/a Rip Van Winkle Farms of Florida was placed on the books of the partnership in the total sum of $1,000,000. This debt arose from a purported oral agreement regarding such sale of cattle in 1973. The time for payment was not fixed by the parties. Payments totaling $350,000 were made to Johnson Farms of Mississippi by the Johnson-Yelencsics Partnership, the last payment being in 1982.

Plaintiff's expert, Mr. Neil Effertz, testified that the 200 head of purebred Charolais heifers sold by Johnson Farms of Mississippi to the Johnson-Yelencsics Partnership in 1973 had a fair market value at the time of purchase of $1200.00 per head. This calculates a fair market value of the 200 head of Charolais

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[3]Johnson Farms of Mississippi showed a cost basis of its "breeding cattle" on its 1975 tax return, for depreciation purposes, of $718,050.00. (Defendant's Exhibit 50, Schedule F-3). The same cost basis depreciation figure is reflected on its tax returns for 1973 and 1974.

purebred heifers at a total sum of $240,000.00. Thus, there was an overstatement of the fair market value of said 200 Charolais purebred heifers on the books and records of the Johnson-Yelencsics partnership in the amount of $760,000.00.

13. The Court finds that the agreed price for the sale of the 1400 head of cattle previously mentioned in paragraph 11 and the 200 head of cattle mentioned in paragraph 12 was the total purchase price of $1,000,000; $760,000 for the former and $240,000 for the latter.

14. At the time of the death of Joseph Yelencsics on September 14, 1987, there remained $650,000 due and owing on the $1,000,000.00 obligations. Following his death, on the 24th day of September, 1987, Plaintiff, Susanna Johnson, on behalf of the Johnson-Yelencsics Partnership a/k/a Rip Van Winkle Farms of Florida paid the balance due of the partnership obligation in the amount of $650,000 to Johnson Farms of Mississippi on March 15, 1989. Thus, the Plaintiff, Susanna Johnson, is entitled to have her Johnson-Yelencsics partnership contribution increased by one-half of said sum, i.e., $325,000.00.

15. It has been previously determined in the Court's Second Amended Findings of Fact filed May 11, 1988, that the Defendant, Joseph A. Yelencsics, as Executor of the Estate of Joseph Yelencsics, Deceased, from the prior accounting herein, is entitled to the sum of $166,420.98. When the sum of $166,420.98 is deducted from the total sum of $325,000.00, the increased capital contribution of Plaintiff, Susanna Johnson, as aforesaid, there

remains an amount due by the Estate of Joseph Yelencsics, Deceased, in the sum of $158,580.02 to the Plaintiff, Susanna Johnson.

16. The field report prepared by the Vinita Production Credit Association in September 1975 (Plaintiff's Exhibit 11, I-13, I-14), is the best evidence concerning the number of cattle located on the parties' Honey Creek Ranch in September 1975. Obviously the continuous calving and sale operation changes the numbers from year to year.

17. The Court accepts the Rip Van Winkle Farms of Florida final partnership accounting of Francis X. Weston, CPA, from its inception to the present, excepting therefrom only the $5,000,000 transaction" and the "$650,000 transaction" as explained herein.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter and the parties herein. 28 U.S.C. § 1332.

2. Any Finding of Fact above which might be properly characterized a Conclusion of Law is included herein.

3. The death of Joseph Yelencsics on September 14, 1987, dissolved the Johnson-Yelencsics a/k/a Rip Van Winkle Farms of Florida Partnership as a matter of law. Okla. Stat. tit. 54, § 234. The parties are entitled to a partnership accounting (Okla. Stat. tit. 54, § 243) and a judgment in accord with the rules of partnership dissolution (Okla.Stat. tit. 54, § 240).

4. The real property in Delaware County, Oklahoma, described below, is not a partnership asset as it was acquired by Susanna Johnson and Joseph Yelencsics in 1973 as tenants in common:

E 1/2 NE 1/4 of Section 32; and all of Section 33 less W 1/2 SW 1/4; and SW 1/4 NW 1/4 and N 1/2 NW 1/4 SW 1/4 of Section 34, all in Township 24 North, Range 25 East; and all of Section 4 less W 1/2 SW 1/4; and N 1/2 N 1/2 and N 1/2 SW 1/4 NW 1/4 and SW 1/4 SW 1/4 NW 1/4 and W 1/2 SE 1/4 NW 1/4 of Section 9; and the Southwest 10 acres of Lot 3 of Section 3, all in Township 23 North, Range 25 East; and E 1/2 SW 1/4 SE 1/4 and SE 1/4 SE 1/4 of Section 3; and all of Section 9 less E 1/2 SE 1/4 SE 1/4 NE 1/4 and NE 1/4 NE 1/4 and W 1/2 E 1/2 and W 1/2 less W 1/2 SW 1/4 SW 1/4 NW 1/4 of Section 10; and N 1/2 SW 1/4 and SW 1/4 SW 1/4 and NW 1/4 SE 1/4 SW 1/4 of Section 14; and W 1/2 and SE 1/4 SE 1/4 of Section 15; and NE 1/4 and E 1/2 NE 1/4 NW 1/4 and SW 1/4 NE 1/4 NW 1/4 and SE 1/4 NW 1/4 and S 1/2 SW 1/4 NW 1/4 and SE 1/4 less 3.729 acres described as follows: Beginning at the Southwest Corner of SW 1/4 SW 1/4 SE 1/4, thence East 495 feet thence North 330 feet; thence West 495 feet; thence South 330 feet to the point of beginning, and SW 1/4 less 61.6 acres sold to Grand River Dam Authority, all in Section 16; and N 1/2 NE 1/4 and N 1/2 SE 1/4 NE 1/4 less 36 acres sold to Grand River Dam Authority of Section 21; and N 1/2 NE 1/4 and N 1/2 NE 1/4 NW 1/4 and NW 1/4 NW 1/4 and SW 1/4 NW 1/4 and S 1/2 SE 1/4 NW 1/4 less 7.9 acres sold to Grand River Dam Authority of Section 22; and NW 1/4 NW 1/4 and W 1/2 SW 1/4 NW 1/4 of Section 23, all in Township 24 North, Range 24 East of the Indian Meridian, containing 3996. acres, more or less, less any mineral rights heretofore reserved and all easements of record.

5. Pursuant to the mandate of the Court of Appeals for the Tenth Circuit, the matters before the Court are how to account for the two partnerships' transactions referred to by the parties as the "$5,000,000 transaction" and the "$650,000 transaction."

6. The Uniform Partnership Act, Okla. Stat. tit. 54, § 201 *et seq.* provides that a partner is entitled to be repaid her capital contributions, and that if, upon dissolution, the assets of the

partnership are insufficient to repay those contributions, a partner may be required to contribute money to the partnership so that neither partner is obliged to contribute more than their share. Okla. Stat. tit. 54, §§ 218(a)(b) and 240. Johnson v. Harry, 78 P.2d 301 (Okla. 1938), and Knapp v. First Nat. Bank & Trust Co. of Oklahoma City, 154 F.2d 395 (10th Cir. 1946). Concerning the law of partnership accounting in Oklahoma, see: Aetna Casualty and Surety Company v. Wofford, 296 P.2d 967, 970 (Okla. 1956); Taliaferro v. Reirdon, 126 P.2d 696, 700 (Okla. 1942); Okla. Stat. tit. 54, § 218(a)-(b) and 240; Johnson v. Harry, 78 P.2d 301 (Okla. 1938); and Knapp v. First Nat. Bank & Trust Co. of Oklahoma City, 154 F.2d 395 (10th Cir. 1946).

7. The books and records of the Johnson-Yelencsics a/k/a Rip Van Winkle Farms of Florida Partnership from 1973 until September 1987 reflected the $1,000,000 transaction, and that $350,000 had been paid thereon by 1982, with the remaining balance due of $650,000 at the time of the death of Joseph Yelencsics. The books and records of the partnership are relevant evidence concerning this acknowledged ongoing obligation. Cobb v. Martin, 32 Okla. 588, 123 P. 422 (1912); Billingslea v. Billingslea, 219 P.2d 989 (Okla. 1950); McLaughlin v. Laffoon Oil Company, 446 P.2d 603 (Okla. 1968); and Farris v. Sturner, 264 F.2d 537 (10th Cir. 1959).

8. Susanna Johnson was entitled to pay, and receive capital contribution credit for, the $650,000 obligation due Johnson Farms of Mississippi by the Johnson-Yelencsics partnership, following the death of Joseph Yelencsics. Harris v. W. R. Hart & Co., 154 P.2d

759 (Okla. 1944), Braumberg and Ribstein on Partnerships, ¶7.15(d), and Okla.Stat. tit. 54, § 233.

9. For the reasons set forth in the Findings of Fact, Plaintiff, Susanna Johnson, is entitled to a judgment against Joseph A. Yelencsics, as Executor of the Estate of Joseph Yelencsics, Deceased, in the amount of $158,580.02.

10. Because the partnership accounting is in dispute, Plaintiff is not entitled to pre-judgment interest. Harris v. W.R. Hart & Co., 154 P.2d 759 (Okla. 1944).

11. The applicable statute of limitations regarding the $650,000 balance due has not expired. Okla. Stat. tit. 12, § 95; Victory Inv. Corp. v. Muskogee Elec. Traction Co., 150 F.2d 889 (10th Cir. 1945), *cert. denied*, 326 U.S. 774.

12. No attorney fee or cost claim is awardable herein because the case essentially involved a partnership dissolution and accounting. While disputes existed relative to various partnership accounts and the contribution of the partners, there is not a prevailing party in a sense permitting an award of attorney fees by Oklahoma statute or by contract. Security Ins. Co. of New Haven v. White, 236 F.2d 215 (10th Cir. 1956), and Joy v. Giglio, 254 P.2d 351 (Okla. 1953).

13. A Judgment in keeping with these Findings of Fact and Conclusions of Law shall be filed contemporaneously herewith.

DATED this 2nd day of Oct., 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

CLOSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID ASHBAUGH and SHERRY ASHBAUGH, Husband and Wife, and DAVID ASHBAUGH, as Parent and Next Friend of JENNIFER ASHBAUGH, DANIEL ASHBAUGH, and BRENDA ASHBAUGH, Minors,

Plaintiffs, Counter-Defendants,

vs.

DAVID A. GOODMAN,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant, Counter-Plaintiff.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Third-Party Plaintiff, Counter-Defendant,

vs.

HEALTH COST CONTROLS,

Third Party Defendant, Counter-Plaintiff.

HEALTH COST CONTROLS,

Cross-Plaintiff,

v.

DAVID ASHBAUGH and SHERRY ASHBAUGH, Husband and Wife, and DAVID ASHBAUGH, as Parent and Next Friend of JENNIFER ASHBAUGH, DANIEL ASHBAUGH, and BRENDA ASHBAUGH, Minors, and DAVID A. GOODMAN,

Cross-Defendants.

Case No. 92-C-565-E

ORDER TO DISBURSE FUNDS
and
DISMISSAL WITH PREJUDICE

The matter of the joint application of HEALTH COST CONTROLS and DAVID ASHBAUGH, comes on for hearing this 29 day of September, 1992. Upon review of the files and records, the Court finds that Plaintiffs David Ashbaugh and Sherry Ashbaugh, individually, and David Ashbaugh as Next Friend of Jennifer Ashbaugh, Daniel Ashbaugh and Brenda Ashbaugh, are entitled to the proceeds deposited in the within cause by State Farm Mutual Automobile Insurance Company, all in accordance with the settlement agreement on file herein.

IT IS THEREFORE ORDERED by the Court that the Clerk of the United States District Court is hereby directed to release all funds deposited in this cause as follows: Total Funds of $20,000.00:

Payee: DAVID ASHBAUGH, SHERRY ASHBAUGH and DAVID ASHBAUGH as Parent and Next Friend of JENNIFER ASHBAUGH, DANIEL ASHBAUGH and BRENDA ASHBAUGH, Minors.

Address: c/o JAMES W. SUMMERLIN, P. O. Box 99, Claremore, OK 74018

IT IS FURTHER ORDERED that said cause is dismissed with prejudice.

S/ JAMES O. ELLISON

JUDGE OF THE DISTRICT COURT

Order Approved as to Form:

David A. Belofsky

DAVID A. BELOFSKY, ESQ.

James W. Summerlin

JAMES W. SUMMERLIN, OBA #8767

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERESA J. WILSON, Personal Representative of the Estate of CHRISTOPHER A. WILSON, deceased,	)	
Plaintiff,	)	
v.	)	Case No. 92C 743B
CATERPILLAR INC., CATERPILLAR INDUSTRIAL INC., CATERPILLAR TRACTOR CO., CATERPILLAR INDUSTRIAL PRODUCTS INC., CATERPILLAR AMERICAS CO., CATERPILLAR OF DELAWARE INC., TOWMASTER CORPORATION, OVERHEAD DOOR CORPORATION, DCO HOLDINGS CORPORATION, D-SIMPCO, INC., OVERHEAD DOOR CORPORATION d/b/a "TOWMASTER", and CATERPILLAR LIFT TRUCKS CO.,	)	
Defendants.	)	

DISMISSAL WITHOUT PREJUDICE

Plaintiff herewith dismisses her claim against the following named defendants only: Overhead Door Corporation, DCO Holdings Corporation, D-Simpco, Inc., and Overhead Door Corporation d/b/a "Towmaster."

This dismissal is without prejudice to future action.

LAMPKIN, McCAFFREY & TAWWATER

By _____

Bob Behlen
Attorney No: 11222
201 Robert S. Kerr
Suite 1100
Oklahoma City, OK 73102
(405) 272-9611

ATTORNEYS FOR PLAINTIFF

WP: 178

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHERYL TOMAO,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA, (substituted for Jerilyn Green),	)	*CIVIL ACTION NO. 92-C-732-E*
	)	
	)	*Tulsa County District Court*
Defendant.	)	*Case No. CJ-91-4258*

O R D E R

Upon the joint motion of the parties, it is hereby **ORDERED** that this action be dismissed pursuant to 28 U.S.C. § 2679(d)(5) for failure to first present a claim pursuant to 28 U.S.C. § 2675(a).

Dated this 25th day of Sept., 1992.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

UNITED STATES OF AMERICA

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United States Attorney

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN FRANCES ROURKE,

Defendant.

No. 85-CR-57-02-C
Civil No. 90-C-524-C

ORDER

Now before the Court for consideration is defendant, Rourke's, motion pursuant to 28 U.S.C. sec. 2255 to vacate, set aside or correct the sentence he is now serving in federal custody. Defendant seeks relief on four grounds. First, he claims that he was convicted in violation of the double jeopardy clause of the Fifth Amendment. Second, he alleges that his conviction was obtained by an unlawfully induced plea of guilty. Third, he asserts that he was denied effective assistance of counsel. Fourth, defendant claims vindictive prosecution.

This Court adopted the United States Magistrate Judge's Report and Recommendation filed December 10, 1990 in which the Magistrate recommended that it would be appropriate to stay consideration of the Section 2255 motion during the pendency of the defendant's three appeals to the Tenth Circuit.[1] The Magistrate found that many of the issues raised in defendant's appeals were also raised

[1] Case Nos. 90-5092, 90-5129, and 90-5130.

in his Section 2255 motion so that the Tenth Circuit's disposition of these issues would render the Section 2255 arguments moot. The Tenth Circuit filed its opinion on December 3, 1990. The Tenth Circuit's findings and conclusions have in fact rendered many of defendant's Section 2255 arguments moot.

Defendant has requested appointment of counsel and an evidentiary hearing to present evidence to support each of his four arguments. Section 2255 provides:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing thereon ...

A hearing is not necessary when the section 2255 motion is either facially inadequate or when even though it is adequate on its face, it "is conclusively refuted as to the alleged facts by the files and records of the case." Gregory v. United States, 585 F.2d 548,550 (1st Cir. 1978) quoting Moran v. Hogan, 494 F.2d 1220, 1222 (1st Cir. 1974). As noted above, in this case most of the issues brought up in the Section 2255 motion have been decided against the defendant by the Tenth Circuit. Defendant entered his guilty plea and was sentenced in this same court. The issues raised in the Section 2255 motion that the Tenth Circuit did not address are ones that this court may properly review relying on the record and its own recollection of the prior proceedings. See, Gregory, 585 F.2d at 550 n.4. In the instant case the court's memory of the prior proceedings and a thorough review of the record conclusively show that the defendant is not entitled to relief. Defendants request for a hearing is therefore denied.

As to the double jeopardy issue, the defendant argues that he was convicted of charges that had been dismissed as part of a plea bargain in the Northern District of Illinois. In addition, he argues that he was indicted, tried, and convicted of these same violations in the Eastern District of Virginia. He further asserts that the Government forced him to dismiss his appeals in the Fourth and Tenth Circuits. He also claims that the Government unlawfully informed the Grand Jury of his other convictions. Finally, he objects to the Parole Commission having access to a copy of his presentence report which contains the prosecution version of his offenses.

On appeal from denial of his Rule 32 motion, defendant made essentially the same double jeopardy arguments. The Tenth Circuit stated that "[a] voluntary guilty plea precludes a criminal defendant from subsequently asserting a double jeopardy defense that was not apparent on the face of the record before the court accepting the plea." United States v. John Francis Rourke, No. 90-5092, 90-5129, & 90-5130, slip op. at 6 (10th Cir. Dec. 3, 1990) citing United States v. Broce, 488 U.S. 563, 569 (1989); Dermota v. United States, 895 F.2d 1324, 1326 (11th Cir.), cert. denied, 111 S.Ct. 107 (1990). Reviewing the three federal indictments filed against defendant in Illinois, Virginia, and Oklahoma the court found that a facially-apparent double jeopardy defense was not established. Id. The Court concluded that defendant's "guilty plea to the Oklahoma charges thus waived the double jeopardy defense ..." Id. citing Broce, 488 U.S. at 569.

In addition, the Court stated that "a criminal defendant may validly waive, pursuant to a plea agreement, his right to appeal." Id. citing United States v. Navarro-Botello, 912 F.2d 318, 321 (9th Cir. 1990); c.f. Johnson v. United States, 838 F.2d 201, 202-04 (7th Cir. 1988d) (voluntary waiver of right to appeal forecloses collateral review), petition for cert. filed (April 21, 1988).

This court conducted an evidentiary hearing on December 2, 1991 as a result of a remand from the Tenth Circuit Court of Appeals. See id. The court was asked to determine whether the defendant was competent at the time he entered his guilty plea. The court held that the defendant fully understood the consequences of the decision to enter into the plea agreement. The plea agreement was clearly highly advantageous to the defendant. Defendant validly and voluntarily waived his right to appeal. He may not now argue that the relinquishment of his right to appeal somehow exposed him to double jeopardy.

The Tenth Circuit did not address the last two assertions concerning double jeopardy. Defendant's claim that the government unlawfully informed the grand jury of his other convictions is inadequate on its face. Because the indictment was dismissed it is difficult to see how this contention, even if true, could constitute double jeopardy. In addition, the government may properly inform a grand jury of prior convictions. United States v. Levine, 700 F.2d 1176, 1179 (8th Cir. 1982).

Defendant's claim that the Parole Commission has copies of prior convictions which it relies on to deny him parole is also

without merit.[2] Section 2255 by its own terms is a vehicle through which a defendant in federal custody "may seek to vacate, set aside, or correct the sentence imposed." Cabrera v. United States, 1992 WL 184066 (2nd Cir. 1992). In this case the defendant is attempting to employ Section 2255 to challenge actions taken by the Parole Commission after the imposition of his sentence. This is precisely what happened in the Cabrera case. In Cabrera the court found:

> Nothing in the language of section 2255 indicates that the statute may be used to attack a later decision of the Parole Commission once a defendant is validly in custody. To the contrary ... the statute refers only to the original imposition of the "sentence." Nor has section 2255 been interpreted by the courts to allow an attack on Parole Commission actions. Actions of the Parole Commission pursuant to their authority to grant or deny parole do not relate to the imposition or validity of a sentence and therefore are not properly adjudicated under section 2255.

Cabrera, citing United States v. Addonizio, 442 U.S. 178, 187, 99 S.Ct. 2235, 2241, 60 L.Ed. 805 (1979) (actions of Parole Commission, taken after imposition of a valid sentence, do not alter legitimacy of judgment and do not supply basis to attack sentence under s 2255) (other citations omitted). The Cabrera court held that because Section 2255 was not applicable in this situation it lacked subject matter jurisdiction to consider the defendant's challenge to the Parole Commission's action. This

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[2] Again, even if this contention were true it is difficult to imagine how this claim pertains to a violation of the double jeopardy clause.

court agrees with this analysis.

Next, defendant claims that his plea was not voluntary and that he did not understand the nature of the charges or the consequences of the plea. He asserts that the Government unlawfully induced him to plead guilty to charges he had already been convicted of in Virginia. He also alleges that the Government forced him to give up his right to appeal his other Federal convictions. In addition, he claims that he was under the influence of psychotropic drugs during the court proceedings. These arguments are all without merit.

The claim that he was incompetent as a result of drugs he was taking was decided against the defendant at the evidentiary hearing held in this court in December of 1991. This court concluded that he was not affected by any medication. Further, at the same hearing it was determined that the defendant fully understood the consequences of his conduct and the decision to enter the plea agreement. There is nothing to indicate that the defendants decision to enter the plea agreement was involuntary or uninformed.

Defendant claims next that his counsel:

(a) refused to defend him at trial;

(b) misadvised him to plead guilty to charges he had already been convicted of;

(c) misadvised him to dismiss his pending stay and appeal in the Tenth Circuit;

(d) misadvised him to waive all double jeopardy claims in this and other federal districts;

(e) refused to participate in certain portions of proceedings leading to his guilty plea;

(f) refused to challenge fraudulent or misleading information in defendant's presentence report;

(g) failed to file a Rule 35(b) motion although he advised the defendant in writing that he would so; and

(h) generally performed to substandard requirements of effective assistance of counsel.

If the defendant is to succeed on his claim of ineffective assistance of counsel he must first show that his counsel's representation fell below an objective standard of reasonableness. In addition he must demonstrate that but for counsel's errors there is a reasonable likelihood that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).[3] The defendant has failed to do this.

There was no trial, therefore, it was not necessary for defendant's counsel to defend him. Further, considering the outcome of the trial of defendant's co-defendant, he was well-advised not to go trial.[4] The defendant entered into a highly advantageous plea agreement with the government and the allegations that the defendant was misadvised in any way are simply not

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[3] The Strickland test applies to challenges of guilty pleas based on ineffective assistance of counsel. Hill v. Lockhart, 744 U.S. 52, 106 S.Ct. 366 (1985).

[4] Defendant was sentenced following the trial of Louis Stallings, his co-defendant. Stallings was found guilty on all counts and sentenced to 75 years of incarceration without parole.

supported. In addition, the Court stated in its December 1991 Order:

> The Court ... has independent recollection of the events which occurred on the date of Rourke's sentencing and change of plea .... He was resolute and rational. The Court specifically asked him if he had a full opportunity to confer with his counsel and whether he was under the influence of any medication that would affect his judgment. Defendant responded that he had conferred with counsel, that he was pleased with his counsel's representation and was not under the influence of any medication.

Order at 4-5.

The defendant cannot now complain that his counsel refused to adequately represent him. The defendant has definitely failed to show that his counsel performed to substandard requirements of effective assistance of counsel.

The argument that the defendant's counsel failed to file a Rule 35(b) motion is not properly before this Court. The Court agrees with the Seventh Circuit which has concluded:

> Counsel's failure to file a motion under Rule 35(b) does not allow a prisoner to contend in the language of 28 U.S.C. § 2255, that the 'sentence was imposed in violation of the Constitution or laws of the United States or that the court was without jurisdiction to impose such sentence, or that the sentence is ... otherwise subject to collateral attack.' Because the absence of a Rule 35(b) motion does not call into question the judgment and sentence, there is no constitutional or statutory shortfall requiring a remedy ... It is enough to conclude that failure to get the Rule 35(b) process under way is not the sort of defect for which § 2255 permits a court to supply a remedy.

United States v. Hill, 826 F.2d 507 (7th Cir. 1987).

Finally, the defendant asserts that the government vindictively prosecuted him. He claims that he was prosecuted in three districts for the same violations and that he was coerced to plead guilty to charges he had previously been found guilty of in other federal districts. He also claims that the government furnished the court with fraudulent information which the Court based its sentence upon. He further contends that the government presented evidence to the Grand Jury in an unlawful manner to gain an indictment. In addition, he argues that the government withheld evidence which was favorable to him[5], gained a plea of guilty from him knowing he was mentally incompetent, and denied him a speedy trial.

The court has already stated that the defendant's guilty plea was voluntary. Therefore, defendant's contention that he was forced or coerced to accept the terms of the guilty plea are without merit. The argument that he was prosecuted for the same violations in three different districts is also without merit. The charges in the Northern District of Illinois were dismissed, he was convicted at trial in the Eastern District of Virginia, and he voluntarily plead guilty to charges here.

The Court gave the defendant the opportunity to challenge the information in the presentence report at the time of sentencing. He did not challenge it then and he may not now do it in his § 2255 motion. The court assumes that the defendant is challenging the

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[5] The defendant does not state specifically what favorable evidence was withheld. It is, therefore, impossible for this Court to determine whether this assertion is valid.

information of his prior convictions that was given to the Grand Jury. As already noted in this opinion, the government may properly inform a Grand Jury of prior convictions. Levine, 700 F.2d at 1179. The defendant was mentally competent at the time of his guilty plea and the government would have no reason to believe that he was not. The contention that the defendant was denied a speedy trial is not properly raised in a § 2255 motion. The focus of a collateral attack after a guilty plea is limited to whether the plea was voluntary and the nature of counsel's advice. Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973).

Accordingly, the defendant's § 2255 motion is denied on all grounds.

IT IS SO ORDERED this 30th day of September, 1992.

H. DALE COOK
UNITED STATES DISTRICT JUDGE